

**DOCKET**

No. 86-492-CFX  
Status: GRANTED

Title: Delbert Boyle, Personal Representative of the heirs  
and Estate of David A Boyle, Deceased, Petitioner  
v.  
United Technologies Corporation

Docketed:

September 23, 1986 Court: United States Court of Appeals  
for the Fourth Circuit

See also:

85-1529  
86-379

Counsel for petitioner: Franecke, Louis S.

Counsel for respondent: Booker, Lewis T., Lacovara, Philip A.

| Entry | Date | Note | Proceedings and Orders |
|-------|------|------|------------------------|
|-------|------|------|------------------------|

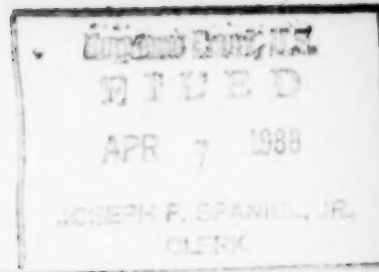
|    |             |   |   |
|----|-------------|---|---|
| 1  | Sep 23 1986 | G | Petition for writ of certiorari filed.  |
| 2  | Oct 6 1986  |   | Brief of respondent United Technologies Corp. in opposition filed.  |
| 3  | Oct 8 1986  |   | DISTRIBUTED. October 31, 1986   |
| 5  | Nov 25 1986 |   | REDISTRIBUTED. December 12, 1986  |
| 7  | Dec 22 1986 |   | REDISTRIBUTED. January 9, 1987  |
| 8  | Jan 12 1987 |   | Petition GRANTED. Justice Powell OUT.<br>*****  |
| 9  | Feb 5 1987  |   | Record filed.   |
| 10 | Feb 5 1987  |   | Certified copy of original record and proceedings, 9 volumes, received.                                     |
| 11 | Feb 25 1987 | G | Motion of Joan S. Tozer, et al. for leave to file a brief as amici curiae filed.                            |
| 12 | Feb 25 1987 |   | Brief amicus curiae of Edwin Lees Shaw filed.   |
| 13 | Feb 25 1987 |   | Joint appendix filed.   |
|    |             | * | Vols. I and II  |
| 14 | Feb 25 1987 |   | Brief of petitioner Delbert Boyle filed.  |
| 15 | Feb 25 1987 |   | Brief amicus curiae of Assn. of Trial Lawyers of America filed.   |
| 16 | Mar 9 1987  |   | Motion of Joan S. Tozer, et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.      |
| 18 | Mar 12 1987 |   | Order extending time to file brief of respondent on the merits until April 29, 1987.                        |
| 19 | Apr 17 1987 |   | Order further extending time to file brief of respondent on the merits until May 21, 1987.                  |
| 20 | May 18 1987 | G | Motion of Bell Helicopter Textron Inc. for leave to file a brief as amicus curiae filed.                    |
| 21 | May 21 1987 |   | Brief of respondent United Technologies Corp. filed.  |
| 22 | May 21 1987 | G | Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae filed.        |
| 23 | May 21 1987 | G | Motion of UNR Industries, Inc. for leave to file a brief as amicus curiae filed.                            |
| 24 | May 21 1987 |   | Brief amicus curiae of Grumman Aerospace Corp. filed.   |
| 25 | May 21 1987 | G | Motion of Defense Research Institute, Inc. for leave to file a brief as amicus curiae filed.                |
| 26 | May 21 1987 | G | Motion of Product Liability Advisory Council, Inc., et al. for leave to file a brief as amici curiae filed. |
| 29 | May 21 1987 |   | Brief amici curiae of Natl. Security Industrial Assn., et al. filed.  |
| 30 | May 21 1987 |   | Brief amicus curiae of United States filed.   |
| 27 | May 22 1987 |   | Lodging received.   |

| Entry | Date        | Note | Proceedings and Orders  |
|-------|-------------|------|---|
| 28    | Jun 1 1987  |      | Motion of Bell Helicopter Textron Inc. for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.  |
| 31    | Jun 2 1987  | D    | Motion of petitioner for additional time for oral argument filed.   |
| 36    | Jun 5 1987  | G    | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.  |
| 32    | Jun 8 1987  |      | Motion of Chamber of Commerce of the United States for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.  |
| 33    | Jun 8 1987  |      | Motion of UNR Industries, Inc. for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.  |
| 34    | Jun 8 1987  |      | Motion of Defense Research Institute, Inc. for leave to file a brief as amicus curiae GRANTED. Justice Powell OUT.  |
| 35    | Jun 8 1987  |      | Motion of Product Liability Advisory Council, Inc., et al. for leave to file a brief as amici curiae GRANTED. Justice Powell OUT.   |
| 37    | Jun 15 1987 |      | Motion of petitioner for additional time for oral argument DENIED. Justice Powell OUT.  |
| 38    | Jun 15 1987 |      | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Powell OUT.  |
| 39    | Jul 1 1987  |      | CIRCULATED.   |
| 40    | Jul 10 1987 | G    | Motion of Chamber of Commerce of the U.S. for leave to file supplemental brief filed.   |
| 41    | Jul 20 1987 |      | SET FOR ARGUMENT. Tuesday, October 13, 1987. (2nd case).  |
| 42    | Aug 26 1987 |      | Motion of Chamber of Commerce of the U.S. for leave to file supplemental brief GRANTED.   |
| 43    | Sep 9 1987  | X    | Reply brief of petitioner Delbert Boyle filed.  |
| 44    | Oct 2 1987  | X    | Supplemental brief of respondent United Technologies Corp. filed.   |
| 45    | Oct 6 1987  | D    | Motion of Edwin Dees Shaw for leave to submit supplemental authority filed.   |
| 46    | Oct 13 1987 |      | Motion of Edwin Dees Shaw for leave to submit supplemental authority DENIED.  |
| 47    | Oct 13 1987 |      | ARGUED.   |
| 48    | Feb 22 1988 |      | The case is restored to the calendar for reargument.  |
| 49    | Mar 7 1988  |      | The parties may file supplemental briefs on reargument, provided the briefs do not exceed 20 pages. Amici curiae may file supplemental briefs on reargument provided the briefs do not exceed 10 pages. Such briefs shall be served and filed on or before close of business Wednesday, April 13, 1988. |
| 50    | Mar 11 1988 |      | SET FOR REARGUMENT, Wednesday, April 27, 1988. (3rd case).  |
| 51    | Mar 18 1988 | D    | Motion of Joan Tozer for leave to participate in oral argument as amicus curiae and for divided argument filed.   |
| 52    | Mar 28 1988 |      | Motion of Joan Tozer for leave to participate in oral argument as amicus curiae and for divided argument  |

| Entry | Date        | Note | Proceedings and Orders  |
|-------|-------------|------|---|
|       |             |      | DENIED.   |
| 53    | Apr 7 1988  | X    | Brief amicus curiae of Edwin Lees Shaw on reargument filed.                         |
| 54    | Apr 8 1988  | X    | Supplemental brief of petitioner Delbert Boyle filed.                               |
| 55    | Apr 11 1988 | X    | Supplemental brief of United States filed.  |
| 57    | Apr 12 1988 | X    | Supplemental brief of Bell Helicopter Textron, Amicus Curiae, filed.                |
| 58    | Apr 12 1988 | X    | Supplemental brief of Grumman Aerospace Corp., Amicus Curiae, filed.                |
| 60    | Apr 12 1988 | X    | Supplemental brief of Natl. Security Industrial Assn., et al., Amici Curiae, filed. |
| 63    | Apr 12 1988 | X    | Brief amici curiae of Aerospace Industries Assn., et al. filed.                     |
| 56    | Apr 13 1988 | X    | Supplemental brief of respondent United Technologies Corp. filed.                   |
| 59    | Apr 13 1988 | X    | Supplemental brief of Chamber of Commerce of US, Amicus Curiae, filed.              |
| 61    | Apr 13 1988 | X    | Supplemental brief of Joan S. Tozer, et al. filed.                                  |
| 62    | Apr 13 1988 | X    | Brief amicus curiae of Assn. of Trial Lawyers of America filed.                     |
| 64    | Apr 27 1988 |      | REARGUED.   |

# **SUPPLEMENTAL BRIEF**

2  
**CASE NO. 86-492**



**In the Supreme Court of the United States**  
**OCTOBER TERM, 1987**

DELBERT BOYLE, as personal representative of  
the estate of David A. Boyle, deceased,  
*Petitioner,*

vs.

UNITED TECHNOLOGIES CORPORATION,  
*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

**SUPPLEMENTAL BRIEF ON REARGUMENT FOR  
EDWIN LEES SHAW, AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER**

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| <i>Johnson v. United States</i> , 749 F.2d 1530 (11th Cir. 1985), approved on reh'g en banc, 779 F.2d 1492 (11th Cir. 1986), rev'd, 107 S. Ct. 2063, 95 L. Ed.2d 648 (1987) ..... | 1, 2, 3          |
| <i>Mackey v. Maremont Corp.</i> , 350 Pa. Super. 415, 504 A.2d 908 (1986) .....   | 6                |
| <i>McKay v. Rockwell International Corp.</i> , 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984) .....   | 2, 3, 5, 6, 7, 8 |
| <i>Shaw v. Grumman Aerospace Corp.</i> , 778 F.2d 736 (11th Cir. 1985), cert. pending (case no 85-1529) .....   | 5, 8, 10         |
| <i>Westfall v. Erwin</i> , 56 U.S.L.W. 4087 (Case No. 86-714; January 13, 1988) .....   | 1, 3, 4          |

### Text

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|--|---|
| Kellman, <i>De-Coupling the Military/Industrial Complex—the Liability of Weapons Makers for Injuries to Servicemen</i> , 35 Clev. St. L. Rev. 351 (1987) ..... | 1 |
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CASE NO. 86-492

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OCTOBER TERM, 1987

DELBERT BOYLE, as personal representative of  
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**SUPPLEMENTAL BRIEF ON REARGUMENT FOR  
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IN SUPPORT OF PETITIONER**

Our purpose in filing this supplemental brief is to update our initial argument by bringing four recent relevant developments to the Court's attention: (1) this Court's decision in *United States v. Johnson*, 107 S. Ct. 2063, 95 L. Ed.2d 648 (1987); (2) this Court's decision in *Westfall v. Erwin*, 56 U.S.L.W. 4087 (Case No. 86-714; January 13, 1988); (3) the Florida Supreme Court's decision in *Dorse v. Armstrong World Industries, Inc.*, 513 So.2d 1265 (Fla. 1987); and (4) a recent law review article in which the issue is explored from a somewhat different perspective than it has previously been explored here: Kellman, *De-Coupling the Military/Industrial Complex—the Liability of Weapons Makers for Injuries to Servicemen*, 35 Clev. St. L. Rev. 351 (1987).

1. In our initial brief, we suggested that an affirmance by this Court of *Johnson v. United States*, 749 F.2d 1530 (11th Cir. 1985), *approved on reh'g en banc*, 779 F.2d 1492 (11th Cir. 1986), *rev'd*, 107 S. Ct. 2063, 95 L. Ed.2d 648 (1987), would amount to rejection of the foundation upon which the "government contractor defense" was constructed in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), and its progeny. Unfortunately, that affirmance was not forthcoming. However, four members of this Court dissented, opining that *Feres v. United States*, 340 U.S. 135 (1950), was wrongly decided—and stating that the *Feres* doctrine should at least not be extended beyond the core cases to which it had previously been applied. Since the defense in issue in the instant case amounts to an extension of the *Feres* doctrine to private independent contractors of the government (an extension which is *well* beyond the limits to which the defense was extended by the majority in *Johnson*), it would appear that at least four members of this Court have agreed with our initial contention—that the *Feres* doctrine provides no legitimate basis for immunizing the entire defense industry from traditional accountability in tort.

Of course, four votes are not enough. However, it is worth noting that the majority's opinion in *Johnson* also appears to reject the foundation upon which the different defense in issue here was constructed. As we noted in our initial brief, the *Feres* doctrine has been historically justified by this Court on essentially three grounds—the distinctively federal relationship of government and soldier, the availability of veterans' benefits, and the need to preserve military discipline. And, as we suggested in our initial brief, the *McKay* Court misread *Feres* in concluding that it was bottomed upon a

fourth ground—the notion that the United States should not bear the cost of accidents to its military personnel through provision for liability insurance or otherwise. The majority's opinion in *Johnson* reiterates the *three* reasons historically advanced in justification of the *Feres* doctrine, and nowhere even arguably hints at the existence of the fourth reason invented by the *McKay* Court. Therefore, notwithstanding that the *Feres* doctrine may have narrowly survived in *Johnson* in cases where the *government* is the tortfeasor, its survival provides no support for the further extension of the doctrine fashioned by the *McKay* Court and advocated here by the defense industry.

2. In a letter to the Court, the government has suggested that the Court's recent decision in *Westfall v. Erwin*, *supra*, may be relevant to the issue presented here. The Court held in that case that federal officials are immune from state tort law actions only where their challenged conduct is within the scope of their official duties and is discretionary in nature, and that they are not otherwise immune from suit for tortious conduct. We are uncertain as to how the government intends to advance the decision in support of immunity for the defense industry here, but if it means to suggest that defense contractors should be treated as federal officials and immunized from suit for their design decisions, we would submit two things in response: (1) private corporations operated for profit simply cannot be considered "agents" of the government merely because they occupy the status of "independent contractors" by virtue of their contracts with the government; and (2) this Court has held essentially that on repeated occasions. See the decisions cited at page 17, footnote 6, of our initial amicus brief.

*Westfall* does appear to be relevant to the issue presented here in another way, however, since it observes that the type of immunity sought by the defense industry here is generally disfavored in the law:

This Court always has recognized . . . that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct. We therefore have held that absolute immunity for federal officials is justified only when "the contributions of immunity to effective government in particular contexts outweigh the perhaps recurring harm to individual citizens." [Citation omitted].

56 U.S.L.W. at 4088.

This Court also observed in *Westfall* "that Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context". *Id.* at 4089. We respectfully submit that both of those observations are peculiarly germane to the similar issue presented here, especially since (as we initially observed): (1) this nation has fought several wars (and maintained effective interim peacekeeping forces) for decades upon decades, without any previously-perceived need to immunize the defense industry from accountability in tort; and (2) Congress has consistently rejected the defense industry's supplications to relieve it from that traditional accountability.

3. When the issue presented here was recently presented to the Florida Supreme Court in *Dorse v. Arm-*

*strong World Industries, Inc., supra*, it was resolved by rejecting *McKay* and its progeny (which include the Fourth Circuit's decision in the instant case)—and by following the Eleventh Circuit's decision in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *cert. pending* (case no. 85-1529). We have proposed that course as an alternative to the Court, in the event that it disagrees with us that no form of the defense should be recognized—and we therefore commend the reasoning of the Florida Supreme Court to this Court:

We are persuaded by the weight of authority, and conclude that a defense similar to that asserted by *Eagle-Picher*—a "military contractor's defense"—should be recognized under the law of this state. We do not find as some courts have suggested, that this defense arises from the doctrine of sovereign immunity. To the contrary, an entity or business acting as an independent contractor of the government, and not as a true agent, logically cannot share in the full panorama of the government's immunity. . . .

Rather, we agree with the Eleventh Circuit that the theoretical basis of this defense is the federal war-making and defense power, which the constitution has entrusted exclusively to the President and Congress. . . .

. . . .

On the other hand, decisions primarily within the discretion of a private independent contractor enjoy no such protection. We find this to be the crucial distinction between those instances in which the military contractor's defense may be asserted in Florida and those in which it may not. . . .

We are persuaded that the test established by the Eleventh Circuit in *Shaw* should be the test used in Florida for establishing a military contractor's defense in a products liability action:

A contractor may escape liability only if it affirmatively proves: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.

*Id.*

To be able to assert this defense, then, an independent contractor affirmatively must show that the decision to confront or create a known material risk essentially was made by the military. As a corollary, the contractor must show compliance with the specifications material to the dispute at bar that were precisely prescribed and required by a contract between it and the government. If the specifications are not precise and leave the contractor with substantial discretion, then the contractor must shoulder strict liability to the extent its exercise of that discretion has caused an injury.

513 So.2d at 1268-69 (footnotes omitted).

A similar conclusion was reached in *Mackey v. Maremont Corp.*, 350 Pa. Super. 415, 504 A.2d 908, 915 (1986), in which the Court disagreed with the Third Circuit's adoption of the *McKay* defense, and limited the defense in Pennsylvania as follows:

The government contract defense has always only protected contractors carrying out the discretionary decisions of the government from the damages caused by the government's own planning or engineering decisions. If the engineering decisions were made by the contractor, or if the government made the decisions without the benefit of the contractor's technical knowledge, then the contractor should not be protected.

4. Finally, we commend Professor Kellman's recent scholarly analysis of the problem to the Court. His article is highly critical of *McKay* and its progeny, and argues that the *McKay* defense amounts to an altogether inappropriate and dangerous extension of sovereign immunity to private commercial interests. He urges that no "government contractor defense" should be recognized for the type of "negotiated contracts" at issue in the several cases presently before the Court, and that the defense should be limited to the "contract specifications defense" which had historically attached only to "advertised contracts", until the *McKay* Court broadened it to confer nearly absolute immunity upon the defense industry for all types of government contracts. To do otherwise, he argues, would be contrary to, and thereby badly undermine, the military's own present procurement policies, which seek to preserve traditional accountability for "negotiated contracts" as an economic incentive to provide the military with safely designed products.

Professor Kellman also argues that product design decisions made by contractors do not constitute the type of military policy which should not be subject to scrutiny by the judiciary, and he suggests alternatives for the protection of military policy less onerous than the *McKay*

defense—alternatives which would satisfy the “separation of powers” concerns of both the *McKay* Court and the *Shaw* Court, without removing the incentives to safety presently provided by traditional accountability for tortious conduct. For his conclusion, we will quote from a portion of his summary of the article, which he provided us for that purpose:

Many of the questions raised by the military contractor defense have been recently and explicitly addressed by Congress. Despite strenuous arguments identical to those made in support of the military contractor defense, weapons contractors failed to convince Congress to refrain from imposing warranties for weapons performance. Contractors for a weapons system must now guarantee in writing that the system and its components conform to performance standards and are free from all defects. In the event of a failure of that weapons system, the contractor must bear the cost of prompt repair or replacement or reimburse the United States for such costs. “The purposes of a warranty in a government contract is to delineate the rights and obligations of the contractor and the government for defective items and services and to foster quality performance.” (Armed Services Procurement Regulation 1-324).

Congress has chosen not to protect military contractors from product liability for defective design and manufacturing. Warranties are a recognized means to hold producers of goods accountable to the users of those goods for losses resulting from defective design or workmanship. To require them of military contractors, despite the objections of those contractors, signifies a profound congressional commitment

to subject military procurement to the laws of the commercial marketplace. Ironically, having lost in Congress, the objections to accountability have been accorded a more sympathetic judicial reception. It must be asked by what authority the judiciary may enact immunities regarding weapons procurement which Congress, constitutionally vested with the authority to determine national security policy, has chosen to reject.

As the last forty years have witnessed the growth of the most powerful military establishment assembled by humankind, there has been the corresponding onus to use that power in the pursuit of policy constitutionally decided. Military strength has been sought, but not militarism. A private source of weapons production has developed, but privatization of weapons policy is eschewed.

In a democracy, there should be resistance to the possibility that weapons makers are intimately involved in establishing this nation’s military policy. There exists some historical apprehension that, if empowered, private weapons makers might initiate and propel military acquisitions in order to advance their pecuniary interests. If it were true, it would be a grievous fault. True or false, it is a possibility which must not receive judicial imprimatur.

The judiciary should hold weapons makers legally accountable to the same degree as any private market participant. If immunities are to be granted to military contractors, Congress should be the grantor. Judicial deference is appropriate only for controversies demonstrably falling into the sphere of policy-making. The judiciary’s role must be to define the

line of demarcation separating military policy determined by proper authorities from the production of weapons by commercial interests.

If corporate weapons makers are extended an immunity from accountability because of the judiciary's misconception that weapons makers can and should guide military policy, then legal control over the most critical matters of national governance is jeopardized. The Supreme Court should reverse *McKay* and *Boyle, et al.* and require the lower courts to allocate responsibility for defective weapons on a case by case basis.

We respectfully submit once again that the Court should not immunize the defense industry from accountability in tort by mandating what Congress has rejected, in the form of a "government contractor defense". Alternatively, if a defense is to be recognized, it should be narrowly drawn along the lines drawn in *Shaw*—to preserve accountability for design decisions made by contractors, and preclude judicial inquiry only where design decisions are truly made by the military as a matter of military policy.

Respectfully submitted,

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# **SUPPLEMENTAL BRIEF**

FOR ARGUMENT  
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APR 11 1988

No. 86-492

Supreme Court, U.S.

FILED

APR 8 1988

JOSEPH F. SPANIOLO, JR.

CLERK

In The  
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October Term, 1986

DELBERT BOYLE, personal representative of the Heirs  
and Estate of David A. Boyle, deceased,

*Petitioner,*

v.

UNITED TECHNOLOGIES CORPORATION,

*Respondent.*

On Writ Of Certiorari To The United States  
Court Of Appeals For The Fourth Circuit

**SUPPLEMENTAL BRIEF FOR PETITIONER**

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## LEGISLATIVE ENACTMENTS

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| Competition in Contracting Act (enacted as Title VII of the Deficit Reduction Act of 1984, included in P.L. 98-369, 98 Stat. 494 and codified at 31 U.S.C. Sections 3551-3556 ..... | 7 |
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## I.

### INTRODUCTION

Petitioner respectfully requests that this Court consider Petitioner's Opening and Reply Brief with this Supplemental Brief as a full presentation.

There are multiple combinations of issues presented, not the least of which is that Petitioner contends and requests reinstatement of the jury's verdict.

By necessity, Petitioner is also forced to address the issue of the "Government Contractor Defense" which is before this Court for the first time and which has many facets.

Petitioner does not concede the importance of the other issues to the Government Contractor Defense.

## II.

### **THE GOVERNMENT CONTRACTOR DEFENSE IS A PURE INVENTION OF THE COURTS AND RESTS ON NO STATUTORY AUTHORITY**

#### **A. THE CONTRACT SPECIFICATION DEFENSE**

The origin of the Government Contractor Defense is clearly distinguishable from that of the Contract Specification Defense.

The Contract Specification Defense rests on negligence principles, and provides that a contractor is not liable for damages resulting from conformance to specific specifications provided by another unless:

- (1) the contractor was negligent in performing the work or

- (2) those specifications were so obviously defective and dangerous that a contractor of reasonable prudence would be put on notice that the product was dangerous and likely to cause injury. *Challoner v. Day and Zimmerman, Inc.* (1975), (CA 5 Tex.) 512 F.2d 77, Vacated on other grounds 423 U.S. 3, on remand (CA 5 Tex.) 546 F.2d 26; *Bynum v. FMC Corporation* (1985), (CA 5 Miss.) 770 F.2d 556.

This defense is based on the presumption that a contractor will lack the expertise to evaluate the specifications given to it and is thus not held to the same high standard of care as is a designer. *Johnston v. United States* (1983), (D.C. Kan.) 560 F. Supp. 351; *Ryan v. Feeney and Sheehan Building Company* (1924) 239 N.Y. 43, 145 N.E. 321.

Thus, in 1940 in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18, this Court held that a Corp of Engineers contractor was not liable for diverting the course of the Missouri River so long as the diversion was within the scope of the contractor's authority. No liability on the contractor was found for the subsequent damage done by the river.<sup>1</sup>

However, even under the Contract Specification Defense, there is a limit to the lower standard of care required of the obedient contractor. In *Pearson v. Could-*

<sup>1</sup>Subsequent decisions involving allegations of negligence in the performance of a service for the government have reinforced this defense. *Meyers v. United States*, 323 F.2d 580 (9th Cir. 1963) work on a federal highway in conformity with the terms of the contract was not subject to liability; and *Dolphin Gardens, Inc. v. United States*, 243 F. Supp. 824 (D. Conn. 1964) authority to dredge a channel insulated the contractor, who had complied with the contract requirements, from liability.

*well-Wingate Co.*, 187 F.2d 832 (2nd Cir. 1951), cert. denied 341 U.S. 936 (1951) Judge Learned Hand held that the trial court correctly instructed the jury that one contractor was liable for defects in the specifications which would have been obvious to an electrical engineer since the contractor employed an electrical engineer, but another contractor was held to a lower standard since he had no engineer in his employ. Thus, the inquiry under the Contract Specification Defense is whether the design defects *should have been* obvious to the contractor in light of the contractor's expertise.

Thus, where the contractor is negligent in not having perceived an obvious defect or one within the state-of-the-art, then the Contract Specification Defense has always been forfeited.

## B. THE EMERGENCE OF THE GOVERNMENT CONTRACTOR DEFENSE DEFIES PROPER EXERCISE OF SOVEREIGN IMMUNITY

Now, before this Court, the Government Contractor Defense, unlike the Contract Specification Defense, attempts to uniquely grant to the contractor a share of the government sovereign immunity.

A contract of manufacture and design with any entity other than the United States is already covered by existing law.

A defense should not be created by the Federal judiciary unless the subject matter of the defense is a matter of Federal Common Law or unless specifically authorized by Federal Statute. *Minnesota v. United States*, 59 S.Ct. 292, 309 U.S. 382 (1939). The Government Contractor De-

fense is not a matter of Federal common law, it is not founded on statute and the judiciary should not justify it as an extension of sovereign immunity. It is purely an invention of the lower Federal Courts.

Twenty years ago, the judiciary recognized no defense for manufacturers claiming to be the alter ego of the military. In *Whittaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010 (5th Cir. 1969) the maker of a hand grenade that prematurely exploded injuring plaintiff was held liable despite the fact that it was operating a government-owned plant, using material supplied by the government, and that the contract provided for indemnification by the government for losses. These facts did not, however, justify granting sovereign immunity to the defendant simply because it occupied a "near symbiotic relationship with the military." In accord was *Foster v. Day and Zimmerman*, 502 F.2d 867 (8th Cir. 1974) ("the doctrine of sovereign immunity may not be extended to cover the fault of a private corporation").

Cleverly, the lower courts based the difference between the specific Contract Specification Defense and the Government Contractor Defense on the burden of proving the governmental compulsion.

Thus, the cases have focused on the question of whether this defense, based on sovereign immunity, will stand if the military "choose" or "approve" rather than *order* the design subsequently alleged to be defective. See *Koutsoubas v. Boeing Company*, 755 F.2d 352 (3rd Cir. 1985).

These lines of cases start with the *Agent Orange* case, 534 F. Supp. 1046 (E.D. N.Y. 1982) cert. denied sub nom

104 S.Ct. 1417 (1984) which litigation bears witness to Justice Holmes' admonition that hard cases make bad law. While the litigation was with regard to injured servicemen from Vietnam being toxically injured by the "Agent Orange" herbicide, the court stated that a Government Contractor Defense could be invoked if defendants proved (1) the government established the specifications for the product, (2) the product complied with the government's specifications in all material respects; and (3) the government knew as much or more than the defendants did about the hazards that accompanied the use of the product.

Of critical importance was the mere requirement of knowledge by the government and the addition of "specifications established by the government" for the compulsion requirement previously demanded by the Contractor Specification Defense cases. Thus clearly putting the responsibility on the government (sovereign immunity) regardless of any knowledge, participation or expertise of the contractor.

Thereafter the litany of cases in the lower courts interpreting specifications established by the government and compulsion have led us to the present case.

It should be clear that by taking this drastic step of insulating the contractor, the judiciary will step far beyond legislative intent regarding the bounds of sovereign immunity.

## III.

**CONGRESS WOULD NOT SANCTION AND  
DOES NOT SANCTION THE GOVERNMENT  
CONTRACTOR DEFENSE**

While the necessity of a private weapons industry has long been undeniable,<sup>2</sup> that necessity is not a justification for denying the accountability of these manufacturers for the weaponry they produce.

It is curious, that in all of the previous cases, including the *Boyle* case here, *not one military officer* has testified that the particular product alleged to be defective was designed by the military, that the defense was needed for a military mission or that an award to the plaintiffs would result in an erosion of military discipline. This necessary ingredient to verify, factually, any implications of a defect causing such an effect has been absent in every case.

Nor is there likely to be. By illustration, Brigadier General Weiss before the Senate Arms Services Committee:

"Ultimate responsibility for product quality and the assurance of the given company's product conforms to contractual specifications and the statements of the work, rests with the prime contractor. The government's role is to assure that the contractor's quality system is working and is reliable through period system checks, audits and selected physical inspection of the products on a pre-planned and random basis. . . .

<sup>2</sup>See, hearings to increase the efficiency of the military establishment of the United States, before the House Committee on Military Affairs, 64th Congress, First Session 498 (1916).

The contractor is responsible for the quality of its product. His responsibilities start with the product's design, carries through product viability reviews and culminates in the manufacturing process.

The government's responsibility is to make sure that the contractor's system is functioning through system checks, and random and selected mandatory inspections and tests of products."<sup>3</sup>

Of no less importance is that Congress has encouraged the private enterprise system of weapons procurement in the United States which has afforded a large opportunity for personal and economic success in order to provide incentives for efficient and innovative production.

In 1985, the Department of Defense placed contracts worth approximately 164 billion dollars, 70% of which went to the top 100 contractors.<sup>4</sup> The beneficiaries now claiming the Government Contractor Defense seek to have it both ways: the pecuniary benefits of the free market with the legal privileges of being part of the military establishment.

Congress also has enacted in the Competition in Contracting Act (Title VII of the Deficit Reduction Act of 1984, included in P.L. 98-369, 98 Stat. 494 and codified at 31 U.S.C. Sections 3551-3556), where Congress has sought a

<sup>3</sup>Task force and Selected Defense Procurement Matters: Hearing before the Senate Armed Services Committee, 98th Congress, 2nd Session 11-12 (1984). See statement of Brigadier General Bernard L. Weiss, Director, Contracting and Manufacturing Policy, Headquarters, United States Air Force).

<sup>4</sup>Conduct and accountability, a report to the President by the President's Blue Ribbon Commission on Defense Management, page one (June, 1986).

procurement system which encourages weapons acquisition through competition.

Congress has, through the Department of Defense, drawn distinctions between "performance specifications" and "design specifications".

Contracts involving an explicit government mandated design specification leaving only actual construction to the contractor are formally advertised to one and all on a competitive basis. Design specifications have been characterized as including "precise measurements, on tolerances, materials, in process and finished product tests, quality control and inspection requirements, and other information."<sup>5</sup>

However, not even a Specification Contract entitles a contractor to rely solely on the drawings and specifications provided nor does the labeling of a contract as containing design specifications remove a contractor's obligation for the extent of the work to be accomplished. *Zinger Construction Co., Inc. v. United States*, 807 F.2d 979 (5th Cir. 1986).

On the other hand, the "Performance Specification Contracts" tend to entail primarily performance specifications merely indicating what characteristics the government requires in the item. "Where an item is purchased by a performance specification, the contractor accepts gen-

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<sup>5</sup>*Appeal of Aerodex, Inc.*, ASBCA 7121, 1962 BCA 3492 (1962).

eral responsibility for design, engineering and achievement of stated performance requirements."<sup>6</sup>

Negotiated contracts contain only performance specifications and leave design of the weapon systems to the expertise and discretion of the manufacturer. "In a performance contract, the contractor must assume responsibility for the means and methods selected to achieve the end result." *Penguin Industries, Inc. v. United States*, 530 F.2d 934, at 937 (Ct. Cl. 1976).

Mere "approval" of the design by the government does not consequently eliminate that responsibility.

The recent testimony of Deputy Secretary of Defense, William H. Taft, IV explains the rationale:

"The quality and productivity of a weapon system is enhanced when we focus our efforts on its critical requirements. In the past, our request for proposals contained thousands of detailed military specifications. These specifications described how contractors were to accomplish specific tasks, allowing little flexibility for contractors to assess and recommend those requirements which were truly needed and effective. Under our new "streamlining" initiative, we are telling contractors what is required rather than how to accomplish it."<sup>7</sup>

Thus, a deliberate policy choice has been made by our senior military officials to award contracts for major weap-

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<sup>6</sup>*Appeal of Aerodex, Inc.*, supra.

<sup>7</sup>Citing hearings, Defense Acquisition Process, Policies, and Instructions, before the House Committee on Armed Services, procurement and military, nuclear system sub-committee, 98th Congress, 2nd Session (statement of Deputy Secretary of Defense, William H. Taft, page 1579/80 (1985)).

ons programs entailing significant design tasks through negotiation because the government wants to evaluate contractors' technical capabilities, technical approaches, and management abilities as well as cost.

This point is critical to the Government Contractor Defense. Congress, through the Department of Defense, has formalized the fundamental difference between the acquisition of relatively fungible commodities as to which it can specify design requirements from the acquisition of sophisticated weapon systems as to which it intentionally assigns design responsibility to the manufacturer.

In such a situation, the acceptance by the military of a particular design choice does not allay the responsibility that the design itself was the choice of the manufacturer in the first instance.

*For this Court now, without benefit of a "clear" indication from Congress, to adopt a Government Contractor Defense will undermine where Congress has been placing the responsibility for many years.*

Petitioners have cited in their Reply Brief other examples of Congressional intent to not immunize government contractors from responsibility for their designs.

#### IV.

#### **THE DISCRETIONARY FUNCTION EXCEPTION TO THE FEDERAL TORT CLAIMS ACT HAS NO APPLICATION TO THE GOVERNMENT CONTRACTOR DEFENSE**

It is implied by some that "a design acceptance" by a government engineer should in some way operate as a

defense to a government contractor or an exercise of the discretion exception under the Federal Tort Claims Act.

This case is one in which the government is not a party. Therefore, the Federal Tort Claims Act has no direct application.

Congress has had ample opportunity to enact a Government Contractor Defense, or if you will, an extension of sovereign immunity to government contractors. Congress has declined. Congress likewise has declined to indemnify government contractors in products liability cases.

The extension of sovereign immunity cannot be accomplished by the Courts. Extension of sovereign immunity like the consent to be sued can only come from Congress, by express statute. *Minnesota v. United States*, 59 S. Ct. 292, 309 U.S. 382 (1939). Petitioner contends that extension of immunity in this context is beyond Congressional intent and this Court's prior decisions.

This Court has recognized the difference between what is meant by "discretion" versus an unlimited freedom to perform any act whatsoever.

In *United States v. Varig Airlines* (1984) 467 U.S. 797, this Court examined the questions of the Federal Aviation Administration's regulations regarding inspection, servicing and overhaul of a Boeing 707 commercial jet aircraft which had an onboard fire that resulted in the death of the passengers.

This Court held that the FAA's implementation of a mechanism for compliance review of a type certificate of a Boeing 707 is plainly discretionary activity of the "nature and quality" protected by § 2680(a). There, the FAA

had determined that a program of "spot checking" manufacturers compliance with minimum safety standards best accommodated the goal of air transport safety and the reality of the finite agency resources. Judicial intervention in such decision making through private tort suits would require the courts to "second guess" the political, social, and economic judgments of an agency exercising its regulatory function.

Boeing, on the other hand, was held responsible regardless of the exercise of the "discretionary" function of the government.

In other words, when dealing with the Government Contractor Defense, should the government engineers' "approval" or their preparation of "product requirements specifications" be construed as a discretionary exception? Petitioner thinks not.

Regardless of the interpretations of the discretionary function, it has still continuously and clearly been held that while policy making may be excluded, *negligent execution of that policy* is not discretionary but in fact exactly what it sounds like, "negligence." In other words, a horse of a different color is still a horse. See *Eastern Airlines, Inc. v. Union Trust Company*, 95 U.S.App.D.C. 189, 221 F.2d 62, summarily affirmed sub nom *United States v. Union Trust Company*, 350 U.S. 907 (1955); *Indian Towing Company v. United States*, 350 U.S. 61 (1955).

When a government engineer is given a design choice to "approve", approval does not eliminate the defect. The exercise of discretion was performed by the designer, not by the government "approval". The government engineer did not design the product, but merely accepted it as

being what it was presented as being, i.e. a product suitable for its intended purpose supposedly without defect.

It should be noted that only if the defense is put in place is it necessary to "second guess" military decisions by establishing whether or not the military in fact wanted a particular design allegedly defective and what its actual knowledge of the defect really was during the design process, the evaluation process, the testing process and later during its implementation in the military system.

See also *West v. Federal Aviation Administration*, 87 C.D.O.S. 4398 (9th Cir., 1987).

## V.

### RESPONDENTS WAIVED A JURY INSTRUCTION ON THE GOVERNMENT CONTRACTOR DEFENSE AT THE TRIAL LEVEL

Petitioner and Respondents had specifically stipulated that this case was to be tried under Virginia law (JA 78-79).

Virginia had not nor to the present date has it adopted the government contractor defense as the law of Virginia.

Similarly, the Fourth Circuit had not adopted the Government Contractor Defense, in any form, until the *Tozer v. LTV Corporation*, 792 F.2d 403 (4th Cir. 1986) case decided in companion with the present *Boyle* case in 1986.

Therefore, the jury instruction on the Government Contractor Defense in this case was improperly given, and is in fact not applicable with regard to the jury's determinations at the trial court level nor here before this Court.

See also a similar case tried in Texas under Texas law wherein the Federal Circuit Court refused to adopt the Government Contractor Defense. *Hansen v. Johns-Manville Products Corp.*, (1984), (CA 5 Tex.) 734 F.2d 1036 cert. denied 470 U.S. 1051 (applying Texas law).

## VI.

### **JUDICIAL FORMULATION OF A GOVERNMENT CONTRACTOR DEFENSE WILL BE EXTREMELY DIFFICULT AND WILL PROMOTE ENDLESS FURTHER LITIGATION**

It is clear from the briefs filed by the parties and many amici, that there is tremendous controversy and confusion among the circuits as to what form a Government Contractor Defense could take.

Even in the previous oral argument, Donald Ayers, Deputy Solicitor General, suggested another version of the defense that would protect high technology development projects but not be applicable to the more common or commercial products purchased by the government.

Even this interpretation creates quite a dilemma.

1. In order that an independent contractor affirmatively show that the decision to confront and create a known material risk was essentially made by the military, military testimony is going to be required. The military will be subpoenaed and deposed and brought into court to testify as to whether or not they were specifically aware of what the actual material risk was and that they knowingly accepted it.

2. Whether the goods or services are of a commercial and non-military nature will have to be determined. One

offered criteria was whether or not same or substantially similar goods were produced for sale to non-military buyers. Value judgments will have to be made by the court as to whether or not the product was first sold to the military and then to the public or to the public and then to the military and are they substantially similar or not.

3. Finally, proof will be needed of timely warnings by the defendant of every reasonably known material risk inherent in the proposed specifications. While this is not necessarily a bad idea, it is merely the "Contract Specification Defense" which is already in place.

Yet all of the different formulations by the various circuits really do not accomplish what Congress and the military have been doing for many years.

If the military desires a product, they can negotiate a contract for one in what is an arm's length transaction. If the military and Congress wish to immunize or protect that contractor from liability, Congress or the military can do so by legislation or a specific provision in the negotiated contract. So far neither has chosen to do so.

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VII.

CONCLUSION

Respondent asks for reinstatement of the jury verdict, or in the alternative, remand for further proceedings in accordance with this Court's decisions.

Respectfully submitted,

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**SUPPLEMENTAL**

**BRIEF**

No. 86-492

Supreme Court, U.S.  
**FILED**  
APR 11 1988  
JOSEPH E. SPANIOL, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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DELBERT BOYLE, PERSONAL REPRESENTATIVE OF THE HEIRS  
AND ESTATE OF DAVID A. BOYLE, DECEASED, PETITIONER

v.

UNITED TECHNOLOGIES CORPORATION

---

*ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**SUPPLEMENTAL MEMORANDUM FOR THE  
UNITED STATES AS AMICUS CURIAE**

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11/8/82

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Although the opening brief in this case addressed primarily the shape that the military contractor defense should take, the first oral argument focused on whether the defense should be recognized by this Court as a matter of federal common law. As noted in our opening brief (at 11-12), the uniquely federal interests involved in the design of military products and the disruptive effects on the national defense of tort suits alleging that such products were defectively designed justify recognition of the military contractor defense as a matter of federal common law. This Court's decision in *Westfall v. Erwin*, No. 86-714 (Jan. 13, 1988), slip op. 3 (quoting *Howard v. Lyons*, 360 U.S. 593, 597 (1959)), in which the Court held that "the scope of absolute official immunity afforded federal employees is a matter of federal law, 'to be formulated by

the courts in the absence of legislative action by Congress,' " bolsters that conclusion.

This Court has made clear that there are two steps in determining whether a particular rule should be recognized as a matter of federal common law. First, it is necessary to decide whether the applicable legal rule is to be determined as a matter of federal or state law. "When Government activities 'aris[e] from and bea[r] heavily upon a federal . . . program,' the Constitution and Acts of Congress 'require' otherwise than that state law govern of its own force.' " *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979) (citation omitted). Second, assuming that the issue is properly governed by federal law, it is necessary to determine whether a specific uniform national rule is appropriate or whether, as a matter of federal law, the various rules of state law should be allowed to govern. In making this determination, the Court has considered the purposes to be served by the proposed uniform national rule, the adverse consequences resulting from the application of the various state law rules, and the disruptive consequences of supplanting the state law rules. *E.g.*, *id.* at 730-733; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 432-433 (1964).

Also, the Court has sometimes been attentive to inferences from legislative action or inaction to the effect that Congress has indicated its disapproval of a proposed uniform common law rule. *Texas Industries, Inc. v. Radcliff Materials Inc.*, 451 U.S. 630, 645 (1981); *United States v. Standard Oil Co.*, 332 U.S. 301, 315 (1947). Absent such a reasonable inference, however, where this Court has concluded that a uniform national rule is indicated as a matter of federal interest, it has fashioned the rule.

1. The intimate connection between the potential product liability of military contractors and the ability of the United States Government to procure the highly specialized weapons systems that it must have for the national defense strongly support the conclusion that federal law must govern. As we indicated in our opening brief (at 12-17), the application to military weapons producers of ordinary state law tort liability rules would discourage those manufacturers from providing necessary assistance in the product design and development process, would undermine military discipline by authorizing the second-guessing of weapons design and procurement decisions, and would increase the manufacturer's uncertainty as to potential liability, thus increasing the costs to the United States as well.

The relationship between the government and its soldiers is "distinctively federal," and its "scope, nature, legal incidents and consequences \* \* \* are fundamentally derived from federal sources and governed by federal authority" (*Standard Oil Co.*, 332 U.S. at 305-306). No less distinctively federal is the relationship between the government and its suppliers of ordnance. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977).<sup>1</sup> Tort suits alleging that military products were

<sup>1</sup> As the Fifth Circuit stated in *Bynum v. FMC Corp.*, 770 F.2d 556, 569 (1985), it is difficult to think of an area that is more uniquely of federal concern since "[t]he composition, training, equipping, and management of our military forces is a matter exclusively within the rights and duties of the federal government and \* \* \* any interference with the federal authority over national defense and military affairs implicates uniquely federal interests of the most basic sort."

Unlike the Fifth Circuit, the Third Circuit in *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (1982), concluded that a military contractor defense did not need to be formulated as a matter of federal common law (although it recognized the defense as a matter of Pennsylvania law). The Fifth Circuit correctly concluded (770 F.2d at 570 n.17 (quoting 696 F.2d at 249)) that the Third Circuit erred by stating that

defectively designed greatly impair the ability of the government to enlist effectively the assistance of private contractors in developing and producing weapons systems required for the national defense, since such liability arises from participation in the design process. It is thus plain that "the authority and duties of the United States as sovereign are intimately involved" (*Texas Industries, Inc.*, 451 U.S. at 641) in the issue of contractor liability, and that this case falls with those where the Court has found the governing law to be federal. *Kimbell Foods, Inc.*, 440 U.S. at 726; *Sabbatino*, 376 U.S. at 427; *Standard Oil Co.*, 332 U.S. at 305; *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943).

2. For the same reasons that federal law must govern the duties of military contractors arising from the development and production of weapons, a uniform military contractor defense—as is set forth in our opening brief (at 17-19)—should be recognized. The government's ability effectively to enlist the assistance of private contractors in the product development process and to acquire effective weapons systems at reasonable cost and in an expeditious manner would be substantially impaired if such a defense is not recognized.<sup>2</sup> This case therefore presents just the

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suits brought against military contractors "generally do not necessitate the second-guessing of military decisions." As the Fourth Circuit concluded in *Tozer v. LTV Corp.*, 792 F.2d 403 406 (1986), "it is nearly impossible to contend that the contractor defectively designed a piece of equipment without actively criticizing a military decision."

<sup>2</sup> It may be answered that the United States can induce contractors to continue to provide product design consultation and assistance by agreeing to indemnify them for all liability to which they are exposed as a result of their role in developing the product. While that may be true, it offers no realistic alternative. The United States is itself generally immune under the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a), from liability for its own

sort of "significant conflict" between "federal policy or interest and the use of state law" that justifies the formulation of a federal common law rule. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966). Indeed, a more striking conflict between a critically important federal interest and the consequences of otherwise applicable state law can not be found among the decisions of this Court invoking uniform federal common law rules.

The decisions of this Court declining to recognize federal common law rules themselves confirm that the military contractor defense should be recognized as a matter of federal common law. In *Kimbell Foods*, for example, while recognizing that federal law governs, the Court declined to substitute a nationwide federal rule for the existing body of state law relating to the priority of liens arising from federal loans. The Court reached that conclusion after noting the minimally disruptive effect of existing state law on the government's lending practices (440 U.S. at 730-737) and balancing it against the disruption that would result from the formulation of separate federal rules to operate against the backdrop of existing state commercial law (*id.* at 739). The adverse consequences on defense procurement resulting from the application of state tort law in the present context are plainly of far more substantial proportions.

In *Miree v. DeKalb County*, 433 U.S. 25 (1977), this Court declined to override state law allowing survivors of

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weapons design decisions, and it would incur a substantial new liability if it were to agree to pay all judgments against contractors arising from challenges to the designs of weapons systems. Since Congress has determined that the United States should not be liable for injuries caused by design defects of military products, the United States should not be forced to assume liability simply because it seeks the assistance of private entities in performing its governmental obligations.

persons killed in a plane crash to sue as third party beneficiaries of a contract between the County and the Federal Aviation Administration, under which the County agreed to restrict activities adjacent to its airport to purposes compatible with normal airport operations. The Court reasoned (*id.* at 31) that "[t]he question of whether petitioners may sue respondent does not require decision under federal common law since the litigation is among private parties and no substantial rights or duties of the United States hinge on its outcome." In the present case, the United States will be substantially and adversely impacted by application of state tort law to the activities of military contractors. It can not be said here, as it was in *Miree* (*id.* at 32-33 (citation omitted)), that "any federal interest in the outcome of the question before us" is " 'too speculative' " or " 'too remote' " to justify application of federal law.

Similarly, in *Wallis* the Court relied on the absence of any significant threat to an identifiable federal policy or interest and declined to substitute a federal rule for Louisiana law relating to the enforcement of contracts transferring rights under federal mineral leasing contracts. The Court found no incompatibility between the application of state law and any federal policy or interest, and on that account upheld the application of state law without even considering the strength of the state interest in having its own rules govern. 384 U.S. at 68.<sup>3</sup>

<sup>3</sup> Furthermore, while the disruption of state policies is a factor to be considered in determining whether federal common law should be applied, it appears that no major disruption would occur here since "a clear majority of courts that have considered the availability of the government contractor defense under applicable state law have decided to adopt the defense." *Bynum* 770 F.2d at 571, citing *Tillett v. J.I. Case Co.*, 756 F.2d 591, 599-600 (7th Cir. 1985) (Wisconsin); *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982) (Pennsylvania); *Hunt v. Blasius*, 55 Ill. App. 3d 14, 370 N.E.2d 617

3. This is not a situation where Congress, by action or inaction, has indicated a preference against the judicial formulation of a military contractor defense. See *Texas Industries, Inc.*, 451 U.S. at 645 ("[t]here is nothing in the statute itself, in its legislative history, or in the overall regulatory scheme to suggest that Congress intended courts to have the power to alter or supplement the remedies enacted"); *Standard Oil Co.*, 332 U.S. at 315 ("the situation is not new, at any rate not so new that Congress can be presumed not to have known of it or to have acted in the light of that knowledge"). Suits against manufacturers of military products were unknown until very recently since, as amicus Association of Trial Lawyers of America pointed out (Br. 9-10), there was no basis for such suits in state law until the 1960s. In response to the revolution in products liability law, the courts immediately formulated the military contractor defense. While there has been some variation in the nature of the defense recognized, no court has refused to recognize the defense altogether, and the majority of courts have followed the approach enunciated in *McKay v. Rockwell International Corp.*, 704 F.2d 444, 449, 451 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984). Thus, Congress's inaction here cannot be presumed to indicate that it does not favor the defense. Rather, if any conclusion may be drawn from Congress's silence, it is that it approves of the defense as fashioned by the court in *McKay*.<sup>4</sup>

(1977); *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 7-9, 364 A.2d 43, 46-47 (1976), aff'd, 154 N.J. Super. 407, 408-410, 381 A.2d 805, 806 (1977); *Casabianca v. Casabianca*, 104 Misc. 2d 348, 350, 428 N.Y.S.2d 400, 402 (Sup. Ct. 1980).

<sup>4</sup> Congress recently has considered but not passed bills that would provide relief to military contractors. Its failure to enact those bills cannot be read as opposition to the military contractor defense as it

The issue presented here has a close parallel in this Court's many cases recognizing an immunity from state law liability for another class of defendants sued on account of actions taken at the behest of the United States—federal employees. In *Howard v. Lyons*, for example, the Court concluded that “the extent of the privilege in respect of civil liability for statements allegedly defamatory under state law which may be claimed by officers of the Federal Government” was plainly a matter of “peculiarly federal concern” that could not be left to determination under “the vagaries of the laws of the several States” (360 U.S. at 597). More recently, in *Westfall v. Erwin*, *supra*, this Court, while restricting the types of conduct to which the immunity applies, recognized the continued vitality of the federal common law defense to be applied in cases alleging that federal employees were negligent under state-law standards. The Court there recognized that “when officials exercise decisionmaking discretion \* \* \* potential liability may shackle ‘the fearless, vigorous, and effective administration of policies of government.’” Slip op. 4-5 (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1959)). The Court noted that “Congress is in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context,” so that

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has been formulated by the majority of the lower courts. The bills have differed from the military contractor defense as enunciated in *McKay* in that indemnification has been proposed for negligent contractors and other provisions have been proposed that would create incentives for contractors not to participate in the design process. As stated in our opening brief (at 21-22 n.21), the Justice Department opposed the bills on account of those problems. By failing to enact legislation, Congress, presumably aware that most of the federal courts have adopted the *McKay* version of the defense, has left matters in the hands of the federal courts.

“[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful” (*Westfall v. Erwin*, slip op. 8). But, while asking Congress for assistance, the Court nevertheless made clear that the defense continues to exist as a matter of federal common law.

A similar approach is warranted here. As indicated by the unanimous view of the lower courts that a military contractor defense should be recognized, potential contractor tort liability would interfere with the efficient procurement of military products, just as potential tort liability on the part of federal employees would interfere with the efficient administration of government. While legislated standards might be useful, in light of the adoption of the *McKay* test by the majority the courts of appeals there is no basis to infer from congressional inaction any disapproval of the defense.

Respectfully submitted.

CHARLES FRIED  
Solicitor General

APRIL 1988

# **SUPPLEMENTAL BRIEF**

APR 12 1986

No. 86-492

# In the Supreme Court of the United States

October Term, 1986

DELBERT BOYLE, Personal Representative of the  
Heirs and Estate of DAVID A. BOYLE, Deceased,

*Petitioner,*

v.

UNITED TECHNOLOGIES CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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## SUPPLEMENTAL BRIEF AMICUS CURIAE OF BELL HELICOPTER TEXTRON, INC., IN SUPPORT OF RESPONDENT

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*Respondent.*

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## SUPPLEMENTAL BRIEF AMICUS CURIAE OF BELL HELICOPTER TEXTRON, INC., IN SUPPORT OF RESPONDENT

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### ISSUES PRESENTED

Bell Helicopter Textron, Inc., files this supplemental brief amicus curiae in support of Respondent, United Technologies Corporation. This brief responds to two questions raised by the Court during oral argument on October 13, 1987:

- 1) What is the source of law of the Military Contractor Defense?

- 2) Should this Court act on the issue of the Military Contractor Defense?

### SUMMARY OF ARGUMENT

The source of law for the Military Contractor Defense is derived from the United States Constitution, from federal statutes and regulations, and procurement contracts thereunder. The obligation of a military contractor to manufacture a product pursuant to detail specifications in the procurement contract exempts the contractor from civil tort liability which otherwise might be imposed under state or federal consumer tort law. It is the Court's constitutional role to resolve conflicting obligations between federal procurement contract law and consumer tort law.

## ARGUMENT

### I.

#### WHAT IS THE SOURCE OF LAW OF THE MILITARY CONTRACTOR DEFENSE?

The Court has inquired as to the source of law of the Military Contractor Defense. The question the Court is posing can best be phrased: "What gives a national defense contractor the legal right to manufacture a product for the Department of Defense, the design of which may be considered unsafe under consumer tort law standards, and exempts the defense contractor from civil tort liability to pay damages to those injured in the use of the product?" The answer is that when the product is manufactured pursuant to the obligation imposed by the specifications of a federal military procurement contract, that obligation carries with it the right to be exempt from liability for civil damages imposed by conflicting consumer tort law standards.

Congress has enacted legislation which imposes upon the contractor the duty to manufacture the product in the design configuration approved by the Department of Defense. Under 10 U.S.C. § 2452 (1956), Congress has directed the Secretary of Defense to establish military specifications and standards. The Federal Acquisition Regulations System (48 C.F.R. Chapters 1, 2, 51-54, Oct. 1, 1987) and its predecessor, the Defense Acquisition Regulations (32 C.F.R. Chapter 1, Parts 1 to 39, July 1, 1984), implement this statutory directive. These regulations are the federal authority for procurement contracts. Pursuant to their authority, the Government contract includes precise specifications for the product that the military procures from the defense contractor.

The military procurement contract, thus authorized by statute and implemented by regulations, imposes a

legal duty on the defense contractor to manufacture the product in conformance with the design configuration set out in the contract specifications. A correlative of this duty to manufacture the product configuration set forth in the contract with the Department of Defense is the right to manufacture the product in compliance with, and in fulfillment of, the contract without being subjected to civil liability for violation of inconsistent obligations arising under state or federal tort law.

When state law creates an obligation for a product configuration inconsistent with the contract specifications approved by the Department of Defense, such state law is preempted under the Supremacy Clause of the Constitution. U.S. Const. art. VI, cl. 2. When federal tort law creates a standard inconsistent with the specifications approved by the Department of Defense in the procurement of military equipment for the national defense, tort recovery must be denied based on the separation of powers doctrine, in that the courts should not second-guess the military in procurement decisions.

As referred to in more detail in Bell's original brief (Pages 11-13), *Public Utilities Commission of Cal. v. United States*, 355 U.S. 534, 543-546 (1958) illustrates that a federal contract on a subject within the federal government's constitutional sphere preempts state law which attempts to impose obligations inconsistent with the federal contract. This is certainly true where the subject involved is military procurement, which has been constitutionally dedicated to the federal government. In that event, as in the present case, state tort remedies are preempted by federal contracts. In *United States v. Allegheny County*, 322 U.S. 174 (1944), involving a contract between the Government and a defense contractor for the purchase of large field guns, this Court stated:

Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.

Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state. (322 U.S. at 182-183.)

Where federal maritime tort law is involved (as in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864-866 (1986) where the Court first recognized a cause of action in strict liability), the same authority vests this Court with the power to establish a defense protecting those who fulfill their obligations under federal military procurement contracts from liability based on tort standards applicable to commercial

products. Whether one calls this a common law principle or statutory interpretation, this Court is called upon to enunciate the standard by which trial courts can resolve the conflicts between federal procurement contract law and consumer tort law.

## II.

### SHOULD THIS COURT ACT ON THE ISSUE OF MILITARY CONTRACTOR DEFENSE?

In the absence of specific legislation by Congress on the issue, this Court is the appropriate constitutional authority to resolve the conflict between those obligations arising under a federal contract to manufacture the military product as specified, with those obligations of state or federal tort law to make the product "safe" in accordance with consumer tort standards. The "Military Contractor Defense" is not a tort defense, like contributory negligence or assumption of risk, which presupposes that the manufacturer has breached a duty to the injured party but which defeats liability based on the conduct of that party. It is not a tort defense which needs to be created, but rather is a test for resolving conflicts between tort and Government contract obligations.

The function of courts is to resolve conflicts of obligations created by different sources of law. This has been the function of courts whether the conflict involves a contract between private parties, a contract between a private party and a state government and, especially so for this court, where the contract is between a defense contractor and the Department of Defense. The Court should decide whether the obligations imposed on United Technologies Corporation by its contract with the Department of Defense in the procurement of military

equipment for the national defense take precedence over different obligations imposed by consumer tort law.

### CONCLUSION

This Court should hold that obligations imposed on a military contractor by a federal contract with the Department of Defense take precedence over obligations imposed on the contractor by state or federal tort law, unless the contractor has failed to warn the government of dangers in the design specifications known to the contractor but not to the Government. Between the contractor's duty to the Government to manufacture the product in satisfaction of the nation's military procurement needs, and the contractor's duty to make the product "safe" under consumer tort law standards, the primary duty is to the Government.

In holding that military contract obligations preempt tort law obligations, the Court would not be making or creating law nor would it be formulating law that protects defense contractors in a situation where ordinarily state law would govern. The Court would be appropriately performing its judicial role of resolving a conflict of obligations. Were this Court to impose upon the manufacturer of military products under federal contract with the Department of Defense the additional duty to manufacture the product in a configuration other than as specified by the contract, i.e., "safe" under consumer tort standards, the Court must then indeed create new law by providing the contractor with the right to violate its contractual obligations with the federal government in order to fulfill its tort law obligations.

Respectfully submitted,  
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I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on April 12, 1988, I served the within *Supplemental Brief Amicus Curiae of Bell Helicopter Textron, Inc., in Support of Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing  
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*(Original signed)*

**SUPPLEMENTAL**

**BRIEF**

APR 12 1988

No. 86-492

JOSEPH F. SPANIOLO, JR.  
CLERK

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**In the Supreme Court of the United States****OCTOBER TERM, 1987**

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DELBERT BOYLE, Personal Representative  
of the Heirs and Estate of  
DAVID A. BOYLE,  
Deceased,  
*Petitioner,*

vs.

UNITED TECHNOLOGIES CORP.,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT

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**SUPPLEMENTAL BRIEF AMICUS CURIAE OF  
GRUMMAN AEROSPACE CORPORATION  
IN SUPPORT OF RESPONDENT**

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No. 86-492

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1986

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DELBERT BOYLE, Personal Representative  
of the Heirs and Estate of  
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Deceased,

*Petitioner,*

v.

UNITED TECHNOLOGIES CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FOURTH CIRCUIT.

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**Supplemental Brief *Amicus Curiae* of Grumman Aero-  
space Corporation in Support of Respondent.**

Grumman Aerospace Corporation ("Grumman") respectfully files this supplemental brief *amicus curiae* in support of Respondent, United Technologies Corporation. This brief addresses two issues regarding the allocation of power and responsibility in the federal system that are critical to disposition of this case and the other cases presently before the Court involving the military contractor defense. The first issue is whether national interests require that the nature and scope of the military contractor defense be defined by reference to federal law rather than

state law. The second issue is whether, within the federal government, this Court should defer to Congress in articulating the defense.

**I. National interests require that the military contractor defense be defined as a matter of federal law.**

Within our system of government, the power and responsibility to provide for the common defense is vested exclusively in the national government, not the states. *In re Tarble*, 80 U.S. (13 Wall.) 397, 408 (1871). As a result, both the relationship between the military and individual servicemen and the relationship between the military and the manufacturers of weapons systems are "distinctively federal" in character. See *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977). And the distinctively federal character of these relationships means that it is appropriate to apply federal common law "to protect the relation once formed from harms inflicted by others." *Standard Oil*, 332 U.S. at 306.

The military contractor defense involves the confluence of these two distinctively federal relationships. The defense determines whether a serviceman injured by an allegedly defectively designed weapons system can maintain a suit against the manufacturer.<sup>1</sup> Such a suit directly affects both the relationship of the serviceman to the military and the relationship of the manufacturer of the weapons system to the military. Maintaining the proper balance in these distinctively federal relationships creates "an overriding federal interest in the need for a uniform

<sup>1</sup>Given the nature of the defense, it has been applied exclusively in situations where it was clear that the serviceman's injuries were suffered "incident to service" and that the government itself was therefore immune from suits. See *United States v. Johnson*, 107 S. Ct. 2063, 2069 (1987).

rule of decision" in such cases, and thus dictates that federal law, rather than the laws of individual states, be applied. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972).

This Court has consistently recognized the overriding federal interest involved in the relationship of a serviceman to the government and has therefore applied federal law to protect and define the relationship. See, e.g., *Standard Oil*, 332 U.S. at 310 (emphasizing the "need for uniformity" in determining the government's right to be indemnified for injuries to servicemen); *United States v. Johnson*, 107 S. Ct. 2063, 2068 (1987) (reaffirming need for "simple, certain, and uniform compensation for injuries or death of those in armed services"), see also *Howard v. Lyons*, 360 U.S. 593 (1959). Because the movement of troops and the deployment of weapons systems are dictated by national needs, there is "no good reason" for the law governing injuries suffered by the serviceman to "vary in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines." *Standard Oil*, 332 U.S. at 310.

Similarly, the relationship between the military and manufacturers of weapons systems also implicates national needs, and the tradeoffs between additional safety which are inherent in weapons system design must be evaluated by reference to uniform national standards defined under federal law. This Court has expressly held that the relationship between the government and a manufacturer of military weapons is governed by federal law. In *United States v. Allegheny County*, 322 U.S. 174 (1944), the Court analyzed a contract between the government and a manufacturer of heavy equipment pursuant to which the manufacturer agreed to produce large field guns. Explaining that "no contention is made that the

contract with [the manufacturer] is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department," 322 U.S. at 182, the Court held that federal law controlled the contract and the rights and obligations of the parties to the contract:

Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the government's general authority were subject to local controls. *The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.*

322 U.S. at 183 (emphasis added). Clearly, to allow each state to determine by reference to its own law whether a military weapons system approved and purchased by the federal government is defectively designed would introduce precisely the "disparities, confusions and conflict" into the "rights and obligations" of the manufacturer which this Court found untenable in *Allegheny County*.

Grumman recognizes that a federal policy in favor of a uniform rule of decision may not be sufficient to displace state substantive law with federal law when the federal interests are outweighed by substantial and legitimate state interests<sup>2</sup>. In the military contractor cases, however, both

<sup>2</sup>The question of whether federal law should define the military contractor defense in a suit relating to injuries suffered by a civilian (Footnote continued on following page.)

of the relationships involved—that of the soldier to the military and that of the military to the manufacturer of the weapon system—are framed by national interests, not state concerns, and are governed by federal law. While the issue of liability of a manufacturer to a serviceman in this context may be complex, "[w]hatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature." See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424 (1964) (holding that federal law controlled the application of the act of state doctrine). Stated differently, the manufacturer of a military weapons system owes its primary duty to the United States military, and just as that duty is defined by national concerns, any breach of that duty should be assessed by reference to a uniform federal law. See *Bynum v. FMC Corp.*, 770 F.2d 556, 570 (5th Cir. 1985).

Applying federal common law to define the nature and scope of the military contractor defense is also consistent with principles of federalism and comity. When dealing with a problem that affects each state alike and the nation as a whole more than any particular state, "[e]xperimentation and varying local solutions are positively undesirable." Comment: *The Federal Common Law*, 82 Harv. L. Rev. 1512, 1521 (1969). Accordingly, in such areas, a federal rule of decision is appropriate even though the claim may be brought under the diversity jurisdiction of the fed-

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(Footnote continued.)

raises a more difficult question because the relationship between a civilian and the government is of a different character from the relationships between the government and the military contractor and the government and its servicemen. Grumman acknowledges that such a case would present a more difficult balancing of the national interests in obtaining sophisticated weapons and the legitimate state interest in insuring compensation for private citizens. In any event, this issue is not presently before the Court and need not now be resolved.

eral courts. *Sabbatino*, 376 U.S. at 424;<sup>3</sup> *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (holding that federal law controls a federal officer's claim of privilege in a defamation action brought under state law). Certainly the exigencies of national defense, like issues of foreign relations, affect the nation as a whole more than any particular state and require application of federal law.<sup>4</sup>

<sup>3</sup>In *Sabbatino* the Court noted that it "could perhaps in this diversity action avoid the question of whether federal or state law is applicable" because New York had adopted the act of state doctrine as part of that state's substantive law. 376 U.S. at 424. Nonetheless, the Court held that federal law applied, because "we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Id.* at 425. The present case involves the same fundamental questions regarding the role of the judiciary and the other branches of our national government (see discussion at Section II *infra*) and should also be determined under federal law.

<sup>4</sup>The federal law, once formulated, should apply in both federal and state courts. Leaving the states free to establish their own versions of the military contractor defense for application in state courts would invite precisely the type of forum shopping between state and federal courts that the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), was designed to prevent. The principles of separation of powers that define the military contractor defense for the federal courts (see discussion at Section II *infra*) are precisely the same, regardless of whether that court sits as a diversity court or a court exercising jurisdiction under a federal statute such as the Death on the High Seas Act. To allow a state court to examine issues of military weapons system design which cannot be examined in the federal courts would not only produce disparate results on the same claims, but would also mean that "the purposes behind the [defense] could be as effectively undermined as if there had been no federal pronouncement on the subject." *Sabbatino*, 476 U.S. at 424.

## II. Separation of powers concerns require the judiciary to recognize the *McKay* standard for the military contractor defense.

Just as principles of federalism require that the military contractor defense be determined by federal law, the doctrine of separation of powers within the branches of the federal government requires that the Judiciary recognize the defense. The military contractor defense operates as a restraint on judicial power to second-guess military decisions regarding the designs of weapons systems. The fact that Congress has not defined the nature or scope of the defense through legislation does not alter the Judiciary's obligation to acknowledge this restraint.

The military contractor defense is not a "defense" in traditional terms. Rather, it defines the justiciability of a serviceman's claim challenging the design of a military weapons system. The Constitution vests the responsibility for making decisions regarding the weaponry of the armed forces with the Executive and Legislative branches of government, and these decisions may not be second-guessed by the Judiciary. See *Gilligan v. Morgan*, 413 U.S. 1, 8-11 (1973). The military contractor defense constitutes a recognition by the Judiciary that a serviceman's claim challenging a weapons system's design is nonjusticiable if adjudicating the claim would require the courts to assess the wisdom of a military decision approving the design of a weapons system.<sup>5</sup>

<sup>5</sup>The fact that the United States is not a direct party to such a suit does not authorize this judicial intrusion, for "[e]ven if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission." *United States v. Johnson*, 107 S. Ct. 2063, 2069 (1987).

Because the military contractor defense acts as a restraint on judicial power, it is not a matter that the courts may ignore unless and until Congress speaks. Recognizing the defense does not mean that this Court is "making law" in an area where Congress should act. Instead, recognition of the defense is mandated by established concepts of separation of powers, and the courts must, out of deference to the other branches of government, apply the defense despite Congressional silence on the issue.<sup>6</sup> To hold otherwise would infer from Congressional silence an endorsement for an expanded role by the Judiciary in overseeing military affairs.<sup>7</sup>

The same separation of powers considerations that require the Judiciary to apply the military contractor defense argue for adoption of the standard first articulated in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). The *McKay* standard, which has been substantially adopted by every Circuit Court of Appeals to consider the issue ex-

<sup>6</sup>Arguably, Congress could define the elements of the defense if it chose to do so. Logically, however, there is no need for Congress to do so, because consistent application of the separation of powers doctrine requires the courts to apply the military contractor defense at least until Congress expressly authorizes servicemen to maintain a suit against the manufacturers of weapons systems approved by the military.

<sup>7</sup>The reluctance of this Court in *United States v. Standard Oil*, 332 U.S. 301 (1947), to create a remedy for the United States does not argue against judicial recognition of the military contractor defense. As one commentator has explained, the *Standard Oil* "opinion should not be read as imposing judicial paralysis in such a case where Congress has neglected to act. What the Court refused to do was create a novel remedy that it thought would peculiarly impinge upon a prerogative of Congress." Hill, *The Lawmaking Power of the Federal Courts: Constitutional Preemption*, 67 Colum. L. Rev. 1024, 1039 (1967). In this case, the Court is not asked to create a remedy, but instead to recognize the boundaries of judicial competence.

cept for the Eleventh Circuit,<sup>8</sup> provides a test "that is relatively clear and that can be discerned with less extensive inquiry into military matters," *United States v. Stanley*, 107 S. Ct. 3054, 3063 (1987), than the standard adopted by the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529). Simply stated, the *Shaw* standard is critically flawed because it requires such a detailed inquiry into the military's decision-making process that the determination of whether the elements of the defense have been met would undermine the very purpose for the defense. As the Court recently explained:

A test for liability that depends on the extent to which particular suits would call into question military discipline and decision-making would itself require judicial inquiry into, and hence intrusion upon, military matters. Whether a case implicates these concerns would often be problematic, raising the prospects of compelled depositions and trial testimony by military officers concerning the details of their military commands. Even putting aside the risk of erroneous judicial conclusions (which would becloud military decision-making), the mere process of arriving at correct conclusions would disrupt the military regime.

*United States v. Stanley*, 107 S. Ct. at 3063.

<sup>8</sup>See *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3337 (U.S. Oct. 23, 1986) (No. 86-674); *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985); *In re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 851 (1986); *Tillett v. J.I. Case*, 756 F.2d 591 (7th Cir. 1985); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352 (3d Cir.), *cert. denied*, 106 S. Ct. 72 (1985); but see *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529).

In summary, the doctrine of separation of powers requires that the Judiciary defer to the Executive and the Legislature on matters affecting the military. The standard for the military contractor defense formulated in *McKay* provides a logical and workable framework for determining when such deference is appropriate. Grumman respectfully submits that this Court should adopt the *McKay* standard as a matter of federal common law and thereby provide a "simple, certain, and uniform" mechanism for resolving controversies in this sensitive area.

### Conclusion.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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**SUPPLEMENTAL**

**BRIEF**

No. 86-492

Supreme Court, U.S.  
**FILED**  
APR 12 1987  
JOSEPH E. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

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DELBERT BOYLE, personal representative of the heirs  
and estate of David A. Boyle, deceased, PETITIONER

v.

UNITED TECHNOLOGIES CORPORATION, RESPONDENT

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On Writ of Certiorari to the United States  
Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR AMICI CURIAE  
AEROSPACE INDUSTRIES ASSOCIATION,  
AMERICAN GEAR MANUFACTURERS ASSOCIATION,  
ELECTRONIC INDUSTRIES ASSOCIATION,  
GENERAL AVIATION MANUFACTURERS  
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TEXAS INSTRUMENTS, INC.,  
AND UNISYS CORPORATION  
IN SUPPORT OF RESPONDENT

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**SUPPLEMENTAL BRIEF FOR AMICI CURIAE  
AEROSPACE INDUSTRIES ASSOCIATION, ET AL.**

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Amici curiae Aerospace Industries Association, *et al.*, submit this supplemental brief, pursuant to the Court's order of March 7, 1988, to address an issue that arose during the oral argument of this case. Specifically, several Justices questioned whether the Court has the authority to recognize a uniform government contractor defense under federal common law. As explained in our opening brief (NSIA Am. Br. 17), every court of appeals to consider the question has agreed that the courts have this authority. Indeed, petitioner has never challenged that proposition.

As we show below, this conclusion is unquestionably correct. This case affects the national security interest of the United States—an essential federal interest that should be governed by federal rather than state law. The substance of this federal law is commonly derived from federal statutes, but in the absence of a controlling statute it is the duty of this Court to fashion the governing legal rules.

**ARGUMENT**

**THE FEDERAL COURTS HAVE THE AUTHORITY TO  
RECOGNIZE A FEDERAL COMMON LAW GOVERN-  
MENT CONTRACTOR DEFENSE TO PROTECT SUB-  
STANTIAL INTERESTS OF THE FEDERAL GOVERN-  
MENT**

Suits against defense contractors alleging design defects in military equipment often arise under federal law. In *Tozer*, 792 F.2d 403 (4th Cir. 1986); *Shaw*, 778 F.2d 736 (11th Cir. 1985); and *McKay*, 704 F.2d 444 (9th Cir. 1983), for example, the injuries occurred on the high seas, and therefore the plaintiff's cause of action and the defenses available to the defendant were determined by judge-made federal maritime law. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641-642 & n.14 (1981); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 588 n.22 (1974). In such circumstances, although Congress is of course free to alter either

the cause of action or the terms of any defense, there can be little doubt that, in the first instance, the federal courts have the authority to recognize a government contractor defense, if such a defense is found to be necessary to protect substantial interests of the federal government.

No different result follows where the plaintiff's cause of action arises, as here, under state tort law. In that context as well, it has long been held that the federal courts possess interstitial law-making power to ensure that the rules imposing liability do not frustrate legitimate federal concerns. As the Fifth Circuit stated in *Bynum v. FMC Corp.*, 770 F.2d 556, 557 (5th Cir. 1985), "[t]hat a plaintiff's claim arises under state law does not preclude [the] formulation of [a] federal defense in cases raising issues of uniquely federal concern." See also *Tozer*, 792 F.2d at 409 n.3. For the reasons discussed in our opening brief (NSIA Am. Br. 13-17), the federal government's compelling interest in the smooth functioning of the military procurement process plainly warrants recognition of a government contractor defense, under federal common law, to state law causes of action that would frustrate that federal interest.

**A. This Court Has Frequently Recognized That Substantial Federal Interests Require The Protection Of Federal Common Law Rules**

By now, it is beyond dispute that this Court will protect important federal interests as a matter of federal common law where litigation threatens to burden essential federal programs. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979); *United States v. Allegheny County*, 322 U.S. 174, 182-183 (1944); *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943). In *Clearfield Trust*, for example, the United States sued to recover the amount of a government check bearing a forged endorsement. The district court held that the rights of the parties were to be determined by the law of Pennsylvania, but this Court unanimously disagreed (318 U.S. at 366) (citations omitted):

The rights and duties of the United States on commercial paper which it issues are governed by federal

rather than local laws. \* \* \* The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other state. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.

Thus, as the Court remarked in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-593 (1973), where activities "aris[e] from and bea[r] heavily upon a federal \* \* \* program," federal law does not permit "state law [to] govern of its own force." State law cannot be allowed to provide the rule of decision where it "would frustrate specific objectives of the federal programs." *Kimbell Foods*, 440 U.S. at 728. See also *Texas Industries*, 451 U.S. at 641 ("our federal system does not permit the controversy to be resolved under state law" where "the authority and duties of the United States as sovereign are intimately involved").

Unquestionably, the federal government's ability to provide for the common defense and, accordingly, its control over military procurement, are federal interests of the highest order that are entitled to this protection. More than a century ago, this Court held that "[n]o interference with the execution of [the] power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service." *In re Tarble*, 80 U.S. (13 Wall.) 397, 408 (1872). The Court has consistently adhered to that view ever since. See, e.g., *Feres v. United States*, 340 U.S. 135, 143-144 (1950); *United States v. Standard Oil Co.*, 332 U.S. 301, 305-306 (1947). By the same token, "[t]he relationship between the Government and its suppliers of ordnance is certainly no less 'distinctively federal in character' than the relationship between the Government and its soldiers." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977).

It was for these reasons that the Court concluded in *United States v. Allegheny County*, *supra*, that federal rather than state law determined whether a private defense contractor was liable for local property taxes on government manufacturing machinery within its possession. Noting that a state law foreclosure action against the contractor could bring production at the defense plant to a halt, the Court concluded that the tax assessment directly impinged on "the congressional power to raise and support armies." 322 U.S. at 182. This consideration necessitated the application of federal common law, because "[p]rocurement policies so settled under federal authority may not be defeated or limited by state law." *Id.* at 183. See also *United States v. State Tax Commission*, 421 U.S. 599, 612-613 (1975).

This case affects the federal government's ability to provide for the national defense to an even greater degree than did *Allegheny County*. In *Allegheny County*, the prospect of judicial interference with the manufacture of military equipment through state law foreclosure proceedings was remote and indirect. Here, by contrast, if state law tort claims such as petitioner's were allowed to proceed, without due consideration of the federal interests at stake, judicial second-guessing of military design decisions would be a foregone conclusion. See NSIA Am. Br. 13-17. Since the defense contract between respondent and the military, like the contract in *Allegheny County*, was "fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department" (see 322 U.S. at 182), this case surely implicates federal interests sufficiently "to warrant the protection of federal law." *Kimbell Foods*, 440 U.S. at 727. See *Bynum*, 770 F.2d at 568-570.

#### **B. Federal Common Law Rules Also Are Required By The Need For A Uniform National Standard**

In determining whether federal common law should provide the governing legal rule, this Court also has considered whether "a uniform national rule is necessary to

further the interests of the Federal Government" (*Miree v. DeKalb County*, 433 U.S. 25, 29 (1977)). "Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules." *Kimbell Foods*, 440 U.S. at 728 (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)). In short, "where there is an overriding federal interest in the need for a uniform rule of decision," this Court repeatedly has fashioned a single federal standard. *Illinois v. City of Milwaukee*, 406 U.S. 91, 105 n.6 (1972). See *Clearfield Trust*, 318 U.S. at 366-367.

Nowhere has the Court resisted incursions by the states more vigorously than in the area of national defense. In case after case, the Court has held that the federal need for national uniformity and unfettered discretion in the military context defeats local interests even in traditional state domains such as family law and property rights. See, e.g., *United States v. 93,970 Acres of Land*, 360 U.S. 328, 332-333 (1959); *Wissner v. Wissner*, 338 U.S. 655, 658 (1950). See also *Stencel Aero*, 431 U.S. at 672; *Standard Oil*, 332 U.S. at 310 (since "the government-soldier relation [is] distinctively and exclusively a creation of federal law," the government's ability to recover costs of an injured soldier's hospitalization and disability pay turns on a federal, rather than state, rule of decision).

The federal government's freedom from state interference is equally crucial in the area of military procurement, as *Allegheny County* confirms. There, the Court feared that deficiency proceedings against private contractors could result in a lock-out against the government if local tax laws were absorbed into the federal law of military procurement contracts (322 U.S. at 187):

If the tax is collected by selling the land out from under the machinery, the effect on its usefulness to the Government would be almost as disastrous as to sell the machinery itself. The coercion of payment from compelling the Government to move its prop-

erty and interrupt production at the Mesta plant would defeat the purpose of the Government in owning and leasing it.

In order to avoid the "disparities, confusions and conflicts which would follow if the Government's general [procurement] authority were subject to local controls" (*id.* at 183), the Court held that local revenue concerns must yield to the national need for military production, as expressed in federal common law rules. *Ibid.*

As we discussed in our opening brief (see NSIA Am. Br. 13-17), tort judgments against defense contractors for flaws in the design of military equipment would undermine the military's control over weapons procurement, and with even greater certainty than the tax assessment in *Allegheny County*. Petitioner, in essence, asked the jury, applying Virginia law, to second-guess weapons design decisions that the military reviewed and approved. But only the Defense Department—not judges or juries—is competent to make the final trade-offs among safety and competing military needs such as combat effectiveness. "[T]o hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions." *McKay*, 704 F.2d at 449.

Moreover, it is hard to imagine a context in which there is a greater need for a single nationwide rule. If innovative technology and combat readiness are to remain the hallmarks of our national defense, the terms of defense procurement contracts cannot be subject to the tort laws of all 50 states. See *Allegheny County*, 322 U.S. at 183. There is "no good reason" why Defense Department standards for military design "should vary in accordance with the different rulings of the several states, simply because [a] soldier marches or today perhaps as often flies across state lines." *Standard Oil*, 322 U.S. at 310; see *United States v. Johnson*, 107 S.Ct. 2063, 2068 (1987). Indeed, this case illustrates the anomalies that would arise if state, rather than federal, law determined the existence or scope of the government contractor

defense. The CH-53 helicopter crashed a mile off the Virginia coast; if the accident had occurred another few miles offshore, suit would have been brought under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*, and federal law unquestionably would have applied. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 212-217 (1986); *Tozer*, 792 F.2d at 409 & n.3 (companion case to *Boyle* decided by Fourth Circuit under DOHSA).

This sort of diversity and uncertainty in the governing rules would create an intolerable situation for government defense contractors—and for the military personnel with whom they work closely in designing military equipment. See NSIA Am. Br. 6-13. The manner in which contractors and the Department of Defense must structure their procedures and decisionmaking in the design of weapons systems cannot be made to depend upon the fortuity of where the defense plant is located or the place—unknown and unknowable at the time of production—where some accident may occur in the future. There would be an inevitable ratchet effect, pressuring contractors to comply with the standards set by the state with the most stringent requirements, at the cost of compromising the military usefulness of the product. Without question, "[t]here is a significant federal interest in uniformity" (*Bynum*, 770 F.2d at 571 n.19) on these matters, which only federal common law can protect.

### C. There Is Ample Authority For Recognition Of A Federal Common Law Defense In Suits Nominally Between Private Parties

This Court's authority to fashion federal common law rules to protect vital federal interests is not limited to situations in which state law is entirely preempted. Rather, the Court has routinely recognized federal common law defenses, so that state law causes of action do not lead to liability in circumstances that would adversely affect the operations of the federal government. See, *e.g.*, *Howard v. Lyons*, 360 U.S. 593, 597 (1959). In *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), for example, the

Court observed that while "suits for damages for abuse of power [by] federal officials are usually governed by local law, [f]ederal law \* \* \* supplies the defense \* \* \* or immunity from suit." *Id.* at 652 (citations omitted). Thus, the fact that the federal question in this case arises in the context of an immunity or defense does not present any impediment to the creation of federal common law.

In fact, the law of immunity as a defense to damages actions against private individuals serving in the government has "in large part been of judicial making." *Barr v. Matteo*, 360 U.S. 564, 569 (1959) (plurality opinion); see *Westfall v. Erwin*, 108 S.Ct. 580, 583 (1988). In *Howard v. Lyons*, *supra*, the Court recognized a federal common law immunity from a state law defamation suit against a naval shipyard commander. 360 U.S. at 597-598. The Court stated that, in "the absence of legislative action by Congress," the validity of the privilege was "to be formulated by the courts" applying federal common law (*id.* at 597):

The authority of a federal officer to act derives from federal sources, and the rule which recognizes a privilege under appropriate circumstances \* \* \* is one designed to promote the effective functioning of the Federal Government. No subject could be one of more peculiarly federal concern, and it would deny the very considerations which would give the rule of privilege its being to leave determination of its extent to the vagaries of the laws of the several States. Cf. *Clearfield Trust v. United States*, 318 U.S. 363.

Similarly, the government contractor defense is a judicially-formulated immunity or defense designed to ensure "the effective functioning of the Federal Government." As in the case of suits against federal employees, state tort law is not entirely preempted in suits against military contractors arising out of their federal responsibilities. State tort law is, however, subject to the limitations of the federal defense—which exists to prevent state law

from being applied in situations where the imposition of liability would frustrate or burden important federal policies and objectives. See *Westfall*, 108 S.Ct. at 583.

Likewise, the fact that the United States is not formally a party to this litigation in no way diminishes the importance of the federal interests at stake or the need to protect them. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-427 (1964); Comment, *Tort Remedies for Servicemen Injured By Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L. Rev. 601, 612-613 (1980). In extending federal tax immunity to a military contractor in *Allegheny County*, the Court emphasized that immunity cases almost always involve claims against private individuals (322 U.S. at 187-188) (emphasis added):

The "Government" is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent or a contractor.

Nonetheless, "neither he nor the Government [could] be taxed for the Government's property interest." *Id.* at 188.

Here, too, the Defense Department, like the War Department in *Allegheny County*, "could have assembled an organization, created a government-owned corporation and erected a plant which would have been wholly \* \* \* immune [from liability]. But for reasons of time and policy it chose to utilize a going concern under private management and ownership." 322 U.S. at 177 (citation omitted). That policy decision did not deprive the Court of the power to assure federal control of the military procurement process under federal common law in *Allegheny County*. Nor does it do so in this case. Needless to say, although the United States is not a named defendant in petitioner's suit, it has a compelling interest in the question "[w]hether [a] military contractor defense is available, and what a contractor must prove to estab-

lish it" (U.S. Am. Br. 1), as evidenced by the Court's request for the views of the Solicitor General prior to the grant of certiorari (106 S.Ct. 2243 (1986)) and by the federal government's active participation (including oral argument) as *amicus curiae*.

In sum, as explained in our opening brief, the government contractor defense is vitally important to protecting the integrity of the federal government's military procurement efforts. If the Court does not concur in that conclusion, then the question whether it has the power to recognize a federal common law defense becomes of little moment. If, on the other hand, the Court agrees that the government contractor defense is essential to protect a core function of the federal government, we submit that it is inconceivable that the Court would be powerless to recognize the defense. Congress, of course, has plenary authority to enact a statute displacing federal common law in cases of this sort. See, *e.g.*, *Illinois v. City of Milwaukee*, 406 U.S. at 107; *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981). Until that time, however, it is the duty of this Court to "declare the governing law in areas comprising issues substantially related to an established program of government operation" (*Little Lake Misere*, 412 U.S. at 593), particularly where, as here, there is a patent and undeniable need for national uniformity.

### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1988

# **SUPPLEMENTAL BRIEF**

No. 86-492

Supreme Court, U.S.

FILED

APR 13 1988

JOSEPH F. SPANIOL, JR.

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

DELBERT BOYLE, PERSONAL REPRESENTATIVE OF THE  
HEIRS AND ESTATE OF DAVID A. BOYLE, DECEASED,

*Petitioner,*

v.

UNITED TECHNOLOGIES CORPORATION,

*Respondent.*

On Writ of Certiorari to the United States Court of Appeals  
for the Fourth Circuit

SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE  
CHAMBER OF COMMERCE OF THE UNITED STATES  
IN SUPPORT OF THE RESPONDENT

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IN THE  
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OCTOBER TERM, 1987

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DELBERT BOYLE, PERSONAL REPRESENTATIVE OF THE  
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v.

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SUPPLEMENTAL BRIEF AMICUS CURIAE OF THE  
 CHAMBER OF COMMERCE OF THE UNITED STATES  
 IN SUPPORT OF THE RESPONDENT  
 \_\_\_\_\_

On March 7, 1988, the Court invited supplemental briefs on reargument in this action. In the instant brief, the Chamber of Commerce of the United States ("Chamber") addresses several points raised at oral argument, and brings a related pending case to the Court's attention.

1. *The Government Contract Defense Impacts the Federal Fisc and Is Therefore Appropriately a Matter of Federal Common Law*

As the Chamber emphasized in its initial brief, the government contract defense should be governed by federal law because it concerns the relationship between the

federal government and its contractors. Chamber of Commerce Amicus Brief at 22-26. Because the Court, at oral argument, questioned the need to carve out an area of federal common law for the defense, the Chamber briefly addresses the issue below, discussing yet another reason for the Court to apply federal common law: the potential impact of the defense on the federal fisc.

In *Clearfield Trust*, one of the first decisions regarding this issue (and to which the Court referred at oral argument), the Court held that the application of federal common law was particularly necessary where liability affects the federal fisc. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); see also *United States v. Walker Dunlap & Sons, Inc.*, 800 F.2d 1232, 1236 (3d Cir. 1986) (the need to protect the federal fisc justifies application of federal common law). If a government contractor is held liable for a tort arising out of its performance of a government contract, in all likelihood the monies for the judgment, either directly or indirectly, will come from the Treasury. For example, if the contract in question contains an indemnity provision such as is required in cost-type contracts, the government would be obliged to indemnify the contractor to the extent it was not covered by insurance.<sup>1</sup> The federal fisc would be affected indirectly through the costs of attorney's fees and insurance, both of which are allowable costs under a cost-type contract. Similarly, in a fixed price contract, if denied the defense and found liable, the contractor would be forced to raise future prices to the government at the expense of the federal fisc.

<sup>1</sup> In fact, under *Land v. Dollar*, 330 U.S. 731, 734, 738 (1947), a case is "against the United States" if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." Thus, to the extent the government is liable for claims asserted by third parties pursuant to its indemnity obligations, the suit is actually against the government.

In addition to the impact on the federal fisc, the Court's recent decision in *Westfall v. Erwin*, 108 S. Ct. 580 (1988), also supports adoption of federal common law for the government contract defense. The Court stated in *Westfall* that "the scope of absolute official immunity afforded federal employees is a matter of federal law." *Id.* at 583 (emphasis added) (citing *Barr v. Mateo*, 360 U.S. 564, 569 (1959) (the law of privilege has "in large part been of judicial making"), and *Howard v. Lyons*, 360 U.S. 593, 597 (1959) ("[n]o subject could be one of more peculiarly federal concern . . . [and] must be judged by federal standards, to be formulated by the courts in the absence of legislative action by Congress")). The unique federal interests presented in both *Boyle* and *Westfall* justify the application of federal law, whether it applies to federal official immunity or the government contract defense. State tort law in both cases remains intact; the only question addressed by federal law is whether a particular defense applies.

Thus, the government contract defense is inextricably bound in federal considerations; the nexus between the defense and the federal government is broad and all-encompassing. The defense arises from the special relationship between the federal government and a federal government contractor; the defense arises out of decisions made by the military, a uniquely federal body; and, as described above, the defense impacts the federal fisc.

## **2. The Products Covered by the Defense Should Include Commercial Products Which Have Been Used for Unique Military Purposes**

Another issue raised by the Court at oral argument is what types of products should be covered: commercial products, commercial products which have been adapted to become military products, or solely military products. *Amicus curiae* propose three categories of products which are appropriately covered by the defense:

- a. Those which are uniquely military, e.g., *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 121 (3d Cir. 1985) (Chinook helicopter was "undisputably" designed for military use), *cert. denied*, 474 U.S. 1082 (1986);
- b. Those which are militarized, e.g., *Tillet v. J.I. Case Co.*, 756 F.2d 591, 596 (7th Cir. 1985) (front-end loader designed for government without roll-over protection qualifies as "military equipment"); *Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976) (at the request of the military commercial jeep produced without safety belts or roll bars), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *certif. denied*, 75 N.J. 616, 384 A.2d 846 (1978); and
- c. Those which are produced as commercial items but are subsequently used by the military for a unique military purpose or in a manner which differs from normal commercial protocols, e.g., *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046, 1057 (E.D.N.Y. 1982) (common herbicide used by military as a "weapon of war").

The defense should apply to all three because all three have in common the unique military nature or military use of the product, which is the conceptual foundation underlying the government contract defense.

Of particular importance is the third type of product, for here the contractor has no control whatsoever over the government's use and adaptation of its product. If the Army decided to use Chevrolets, for example, in a jungle area with no roads, a contractor could neither anticipate nor control such a decision. By making a decision to use the Chevrolets in a "non-commercial" context, the military has identified a use peculiar to it. Under the separation of powers doctrine, the reasonableness of this determination should not be examined by the judiciary.

Moreover, viewing these three categories in light of the *McKay* test highlights the inadequacies of that version of the defense. *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). Not only would *McKay* require judicial second-guessing of military decisions, but arguably it would not protect a contractor where the product was designed for commercial use and then used by the government for unique military purposes which the contractor could neither anticipate nor control.

### 3. The Defense Should Apply Regardless of the Plaintiff's Civilian or Military Status

A third issue raised by the Court at oral argument was whether the defense should apply without regard to the status of the plaintiff. Under the first element of the *McKay* test, the defense applies only if the plaintiff is barred from suing the government under *Feres*, i.e., if the plaintiff is in the military and the injury occurred incident to military service. *Amicus curiae* contend that this element of *McKay* misinterprets the underlying basis for the defense, lacks a rational basis, and unduly restricts application of the defense.

The underlying basis for the government contract defense is *not* the notion that a contractor should share in the government's sovereign immunity. Rather, the defense is rooted in the doctrine of separation of powers: the judiciary is not competent to second-guess military decisions regarding equipping and training of the armed forces. The defense is the mechanism by which the courts can avoid interfering with military deliberations. Thus, adherence to the separation of powers doctrine requires the judiciary to focus on the *product*, not the plaintiff, for it is the product which invokes the decision made by the military. *E.g.*, *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d at 121 ("[t]he separation of powers principle that bars judicial second-

guessing of military judgments applies, *regardless of the status of the plaintiffs*, wherever recovery is sought for an alleged defect in a product designed for military use") (emphasis added); see generally *The Paquete Habana*, 189 U.S. 453, 464 (1903) (whether or not a claim can be made against the United States, the United States had adopted the acts of the alleged wrongdoers and had "made those acts its own").

The first element of the *McKay* test also lacks a rational basis. To allow the defense only when the plaintiff was injured incident to military service results in an inconsistent application of the law; the status of the injured person is an incidental and random fact unrelated to the design and use of the product.

Finally, to restrict the defense to military plaintiffs unduly limits its application and unjustly penalizes a contractor for something over which it has no control: who will be exposed to the military equipment. In *Mannheim*, for example, the military aircraft was used to transport civilians and enlisted personnel. The contractor had no control over who would be in the aircraft; the military chose to use the aircraft in that fashion. Thus, *amicus curiae* suggest that the Court fashion a government contract defense which will focus on the nature of the product and its use and not the plaintiff.

#### 4. *Beech Aircraft Corp. v. Rainey*

There is currently a case pending before the Court which is closely related to the government contract defense: *Beech Aircraft Corp. v. Rainey*, 827 F.2d 1498 (11th Cir. 1987), *cert. granted*, 56 U.S.L.W. 3590 (U.S. Feb. 29, 1988) (No. 87-981 et al.). The facts in *Beech*, as in *Boyle*, are directly related to the military and its decision-making processes. Nowhere, however, do the parties in *Beech* or even the Eleventh Circuit acknowledge the military nature of the case and its impact on the Court's consideration.

In *Beech* the Court will address two evidentiary questions. First, the Court must determine whether, in a report prepared by a military officer, the evaluative conclusions constitute "factual findings" as expressed in Fed. R. Evid. 803(8)(c). This inquiry will necessarily involve separation of powers issues. Second, in *Beech* the Court must determine whether under Fed. R. Evid. 106 a military officer may testify as to his opinion regarding the cause of an accident. This question confronts the prohibition against military officers second-guessing their superiors, as expressed in *Feres* and *Stencel*. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673, *reh'g denied*, 434 U.S. 882 (1977); *Feres v. United States*, 340 U.S. 135 (1950); see also *United States v. Johnson*, 107 S. Ct. 2063 (1987).

Thus, in *Beech* the Court will be to a great extent considering many of the same fundamental principles as in *Boyle*. Consequently, the *Beech* case highlights the potential impact of the Court's formulation of a government contract defense.

#### CONCLUSION

*Amicus curiae* respectfully request this Court to fashion a government contract defense which is based on federal common law and which has broad application to include first, any type of product affected by a military decision; and second, suits by civilian plaintiffs.

*Amicus curiae* submit that the cases in which the defense arises are easily distinguishable from commercial product tort cases. In every commercial case, the company that procured the product which injured the plaintiff would be a party. In military cases, the United States is not only removed from the suit, but takes with it vital information about the military nature of the product, its use, and how decisions regarding its use were made. This phenomenon underscores the importance

and need for a viable government contract defense that adequately protects the government contractor, while upholding the constitutional mandate of separation of powers.

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April 13, 1988

# **SUPPLEMENTAL BRIEF**

APR 13 1988

JOSEPH F. SPANIOLO, JR.  
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OCTOBER TERM, 1987

DELBERT BOYLE, Personal Representative Of The  
Heirs and Estate of David A. Boyle, Deceased,  
*Petitioner,*  
v.

UNITED TECHNOLOGIES CORPORATION,  
*Respondent.*

On Writ of Certiorari to the United States Court  
of Appeals for the Fourth Circuit

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April 13, 1988

### **RULE 28.1 LISTING**

A Rule 28.1 Listing was previously made on behalf of respondent United Technologies Corporation in the Brief for the Respondent, filed May 21, 1987.

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**SUPPLEMENTAL BRIEF FOR  
THE RESPONDENT ON REARGUMENT**

At the initial oral argument on October 13, 1987, members of the Court questioned (1) whether the "military contractor defense" should be governed by federal or state law, and (2) whether the courts should defer to Congress in fashioning the defense. We respectfully suggest that those issues are not properly before the Court.<sup>1</sup> Nevertheless, this Supplemental Brief addresses them.

**I. THE MILITARY CONTRACTOR DEFENSE EXISTS  
AS A MATTER OF FEDERAL LAW.**

The constitutional allocation of powers between the national government and the states, as embodied in the Supremacy Clause, U.S. Const. Art. VI, cl. 2, requires that matters of a uniquely federal character be governed by federal law. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). Under this central principle of federalism, the use of state tort law to regulate military design determinations would impermissibly encroach upon an area that is exclusively reserved to the

<sup>1</sup> In the court of appeals, petitioner never challenged the existence of the military contractor defense, but rather argued only that respondent ("Sikorsky") had not met its burden of proving the defense. Brief of Appellee at 9-14. Similarly, in his petition for certiorari, he assumed that the defense exists as a matter of federal law, phrasing the principal question as:

"In light of the conflicting definitions of the 'government contractor defense' in the various circuits, what are the factual tests for the government contractor defense to be uniformly applied in all circuits?"

Petitioner's briefs before this Court were limited in the same way, and his counsel conceded at oral argument that federal law was the source of the defense. Tr. at 11-12. Accordingly, under Supreme Court Rule 21.1(a), the question whether the defense should be recognized at all as a matter of federal law is not properly before the Court. *See e.g., EEOC v. Shell Oil Co.*, 466 U.S. 54, 66 & n.17 (1984); *Mt. Healthy City School District Bd. of Ed. v. Doyle*, 429 U.S. 274, 278-79 (1977).

federal government and is imbued with uniquely federal interests. It is a constitutional imperative, therefore, that federal courts, through the application of federal law, foreclose state intrusion into federal military design decisions.

**A. Federal Courts Have Repeatedly Recognized "Federal Common Law" Defenses In Areas Of Uniquely Federal Interest.**

1. It is wrong to suggest, as certain *amici* have done, that recognizing a federal military contractor defense would somehow "overrule" *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). The decision in *Erie* established that federal courts do not derive power to create rules of decision for private controversies merely because the diversity clause confers jurisdiction to decide those controversies. The *Erie* doctrine, however, simply restores the federal balance ordained by the Constitution, and does not "bring within the governance of state law matters exclusively federal . . . or . . . vitally affecting interests, powers and relations of the Federal Government . . . ." *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947). Thus, even after *Erie*, the

"federal judicial power to deal with common-law problems . . . remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *Id.*

As if to illustrate this important distinction, the Court held in a case decided the same day as *Erie* that federal common law applied to a dispute between private parties regarding water rights on an interstate stream. *Hinderlider v. LaPlata River Co.*, 304 U.S. 92, 110 (1938). To this day, the Court has continued to recognize the power and the duty of federal courts to fashion federal common law where necessary to protect important federal interests. See, e.g., *Clearfield Trust Co. v. United States*, *supra* (government's rights and duties under federal commercial paper governed by fed-

eral law); *United States v. Allegheny County*, 322 U.S. 174, 183 (1944) (federal procurement policies control question regarding defense contractor's state tax liability); *Westfall v. Erwin*, 484 U.S. —, 98 L.Ed.2d 619 (No. 86-714) (1988) (immunity of federal officials in state tort actions is a matter of federal law).

Recognizing the military contractor defense as part of federal common law simply acknowledges that the federal courts have ample power to fashion federal law to govern disputes that implicate primarily national interests, even where the "authority for a federal rule is not explicitly or clearly found in federal statutory or constitutional command." P. Bator, D. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's the Federal Courts and the Federal System* 770 (2d ed. 1973).

2. Of course, given the limited nature of federal judicial jurisdiction, federal courts are understandably reluctant to create federal common law rights of action and liabilities, since recognizing a federal claim automatically expands the subject-matter jurisdiction of the federal courts. *Jackson Transit Authority v. Transit Union*, 457 U.S. 15, 30 (1982). See *United States v. Standard Oil Co.*, *supra*; *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). Judicial creation of a federal cause of action, however, is a far cry from recognizing a federal defense—applicable in federal or state proceedings—that is necessary to protect important federal interests from the vagaries of state-imposed liabilities. The fact that a plaintiff's claim "arises under state law . . . does not preclude the formulation of a federal defense in cases raising issues of uniquely federal concern," *Bynum v. FMC Corp.*, 770 F.2d 556, 567 (5th Cir. 1985).<sup>2</sup>

<sup>2</sup> Recognizing a federal defense does not expand federal court jurisdiction. See *Caterpillar, Inc. v. Williams*, 482 U.S. —, 96 L.Ed.2d 318 (1987); *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974).

For example, both of the seminal post-*Erie* "federal common law" cases, *Clearfield Trust, supra*, and *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), concluded that federal common law, not state law, must govern the defense of estoppel in claims based on federal commercial paper, since there is a "uniquely federal interest" in forming the law of governmental financial obligations. See also *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1264, 1269 (9th Cir. 1979) (federal law rather than state law governs the estoppel defense in actions under state law against pension funds, even before congressional intervention under ERISA).

In other contexts as well this Court has recognized federal defenses that "may reshape the common-law landscape" of state tort law. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Thus, for example, the Court recently held that the overriding federal interest in protecting freedom of speech may preclude liability under the newly created tort of "intentional infliction of emotional harm." *Hustler Magazine v. Falwell*, — U.S. —, 108 S. Ct. 876 (No. 86-1278) (1988). *Accord NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (tortious interference with trade or business); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (libel). See also *Farmers Educ. & Coop. Union of America v. WDAY, Inc.*, 360 U.S. 525 (1959) (federal prohibition against censorship by broadcasters of political messages broadcast under "equal time" rule gives rise to a federal defense to libel actions under state law).

Earlier this Term, in *Westfall v. Erwin, supra*, the Court reaffirmed that federal official immunity as a defense to state tort liability "is a matter of federal law, 'to be formulated by the courts in the absence of legislative action by Congress.'" 98 L.Ed.2d at 625, quoting *Howard v. Lyons*, 360 U.S. 593, 597 (1959); see *Barr v. Mateo*, 360 U.S. 564 (1959). See also *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (presidential immunity rooted in separation of powers). Similarly, in *Banco*

*Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), a diversity case, the Court recognized the Act of State doctrine as a federal defense to state-created liabilities. Relying on the "uniquely federal" nature of foreign affairs problems and the constitutional delegation of foreign affairs functions to the executive branch, the Court explained that

"an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."

376 U.S. at 425. See also *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976).

The constitutional underpinning of these cases is essentially that of preemption under the Supremacy Clause. The authority of the states to create and impose liability must yield when that authority collides with discernible federal policies. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979). Even where a federal statute does not specifically address a precise issue, state law must give way to federal interests in areas where applying state law would "stand as an obstacle to the accomplishment" of federal law or policy. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982). See, e.g., *Farmers Educ. & Coop. Union v. WDAY, Inc., supra*, 360 U.S. at 535.

3. To be sure, some of these federal defenses are designed to vindicate specific constitutional or statutory provisions. See, e.g., *NAACP v. Claiborne Hardware Co., supra*; *Farmers Educ. & Coop. Union v. WDAY, Inc., supra*. In many cases, however, there were no specific textual bases for the defenses. For example, in the official immunity cases, the Court has formulated a fed-

eral defense to state-created liability based not on a specific statute or constitutional clause, but on the "peculiarly federal concern," *Howard v. Lyons*, *supra*, 360 U.S. at 597, in "insulat[ing] the [governmental] decisionmaking process from the harassment of prospective litigation," *Westfall*, 98 L.Ed.2d at 625.

Similarly, the Act of State defense, which is "binding on federal and state courts alike," is "compelled by neither international law nor the Constitution" nor a federal statute. *Sabbatino*, 376 U.S. at 427. Rather, the defense finds more diffuse but nevertheless discernible support—"underpinnings," 376 U.S. at 423—in the interplay of various constitutional and statutory provisions and in the important federal policies reflected in them. *See, e.g., Sabbatino*, 376 U.S. at 427 n.25. *See also, e.g., D'Oench, Duhme & Co. v. FDIC*, *supra*, 315 U.S. at 465-75 (federal common law of governmental commercial paper derived from policies of National Banking Act and Federal Reserve Act).

Of course, federal common law defenses may be necessary even when the dispute is between private parties. *See, e.g., Hinderlider v. LaPlata River Co.*, *supra*; *Banco Nacional de Cuba v. Sabbatino*, *supra*; *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640 (9th Cir. 1961). The crucial inquiry is whether resolution of the underlying issues will "involve the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority." *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 642 (1981).

Thus, it is now well-settled that, despite *Erie*, it is "precisely when Congress has not spoken" in an area of important and palpable federal concern "that *Clearfield* directs federal courts to fill the interstices of federal legislation 'according to their own standards.'" *United States v. Kimbell Foods, Inc.*, *supra*, 440 U.S. at 727, quoting *Clearfield Trust*, 318 U.S. at 367.

## B. The Military Contractor Defense Is Necessary To Protect Uniquely Federal Interests.

1. The circumstances under which a military contractor may be liable for the design of military weapons and equipment is an issue of special federal concern. Under the Constitution, protecting the national defense and conducting war are the exclusive province of the federal government. U.S. Const. Art. I, § 8, cls. 11-14; Art. II, § 2, cl. 1; *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). *See also Orloff v. Willoughby*, 345 U.S. 83, 94 (1953). The responsibility for determining how the military will conduct its business rests solely with the federal government. *Schlesinger v. Ballard*, *supra*, 419 U.S. at 510. Undeniably, the composition, training, equipping and management of the military are the concern of the federal government alone and "implicate[] uniquely federal interests of the most basic sort." *Bynum v. FMC Corp.*, *supra*, 770 F.2d at 569.

The Court already has decided that federal law must govern the distinctly federal relationship between the United States and its suppliers of ordnance. *E.g., Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). *See also United States v. Standard Oil Co.*, *supra*. The common law applicable to military procurement contracts is exclusively federal. *See United States v. Seckinger*, 397 U.S. 203, 209-10 (1970); *United States v. Allegheny County*, *supra*. Federal common law even extends to many aspects of the contractual relationship between a defense contractor and its subcontractors. *See, e.g., American Pipe & Steel Corporation v. Firestone Tire & Rubber Company*, *supra*, 292 F.2d at 643; *United States v. Taylor*, 333 F.2d 633, *on rehearing*, 336 F.2d 149 (5th Cir. 1964); *Grinnell Fire Protection Systems Co., Inc. v. Regents of the University of California*, 554 F. Supp. 495 (N.D. Cal. 1982). It would be bizarre to rule that there is a weaker federal interest in defining the obligations of a military contractor to a Marine

pilot for supplying weapons systems to the Navy in accordance with the Navy's specifications. As the Court explained in *Allegheny County*, in holding that state tax characterizations could not apply to a military contract, the "validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties . . . present questions of federal law not controlled by the law of any state." 322 U.S. at 182. See *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592-93 (1973) (state law cannot "govern of its own force" activities "arising from and bearing heavily upon a federal . . . program"); *Public Utilities Comm'n v. United States*, 355 U.S. 534 (1958) (state regulation may not interfere with federal procurement process).

2. As the Court has recognized, state regulation can be as effectively exerted through an action for damages as through formal statutes or regulations. See, e.g., *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 (1959). "The obligation to pay compensation can be, indeed is designed to be, a patent method of governing conduct and controlling policy." *Id.* at 247. See also *NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at 916-20. Thus, if states, through the medium of their tort law, were permitted to pass upon the adequacy of military design decisions, they would unduly interfere with vital federal interests. It is necessary, therefore, to fashion a rule of federal law adequate to protect those federal interests from state regulation.

In *Westfall*, 98 L.Ed.2d at 625, the Court recently explained that immunity from state tort liability must be recognized when it is functionally necessary to do so in order to protect federal governmental processes from the "harassment of prospective litigation." For similar reasons, in *United States v. Stanley*, 483 U.S. —, 97 L.Ed.2d 550, 566 (1987); *United States v. Shearer*, 473 U.S. 52, 58-59 (1985); *Stencel Aero Engineering Corporation v. United States*, *supra*, 431 U.S. at 673; and *Feres v. United States*, 340 U.S. 135 (1950), the Court

upheld other types of defenses in order to minimize the impact on military processes and military discipline that would result from litigation concerning injuries sustained by soldiers incident to military service. See also *Chappel v. Wallace*, 462 U.S. 296 (1983).

Just as in those cases, a tort action challenging the government-approved design of military equipment as "negligent" or "unreasonably dangerous" would impermissibly "involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel*, 431 U.S. at 673. Whether the suit is against the government directly or against the military contractor retained by the government, therefore, "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of a military mission." *United States v. Johnson*, 481 U.S. —, 95 L.Ed.2d 648, 659 (1987) (footnote omitted).<sup>3</sup> Since civilian contractors work closely with military personnel in developing military design and play an integral role in military affairs, "an inquiry into the civilian activities" in a design defect action against a military contractor "would have the same effect on military discipline as a direct inquiry into military judgments." *Id.* at 659 n.11. See *Tozer v. LTV Corp.*, 792 F.2d 403, 406 (4th Cir. 1986), *petition for cert. pending*, No. 86-674 (filed Oct. 23, 1986).

In this case, for example, the Navy assisted in, reviewed, and approved all aspects of the design of the escape hatch of the CH-53D helicopter, including the design concept, the general and detailed design specifications, the design drawings, the prototype, the flight testing, and even the operational manuals. Brief for Re-

<sup>3</sup> See, e.g., *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 187, 191 (2d Cir. 1987), *petition for cert. pending*, No. 87-436 (filed Sept. 15, 1987); *Bynum v. FMC Corp.*, *supra*, 770 F.2d at 505; *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 449 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

spondent at 2-4. Thus, the functional concerns about litigation-related interference with governmental processes that underlie the *Barr-Westfall* immunity and the *Feres-Stencel* defense equally justify recognizing the military contractor defense as a matter of federal law.

3. Quite apart from avoiding intrusion into command decisions, there is another functional basis for recognizing the military contractor defense. As the Solicitor General emphasizes, this defense is essential to the effective functioning of the military procurement process. Brief for the United States as *Amicus Curiae* at 10 ff. Military designs, which balance safety against performance, cost, and expedition, and which may be on the cutting edge of technology, often assume risks far beyond those ordinarily acceptable in civilian society. See, e.g., *Bynum v. FMC Corp.*, *supra*, 770 F.2d at 569. Judges and juries, however, might "demand extensive safety testing" that would "impose costs and delays inconsistent with military imperatives." *In re "Agent Orange" Product Liability Litigation*, *supra*, 818 F.2d at 191. In supporting this defense, the government recognizes that judicial second-guessing of military design determinations would induce military contractors to minimize their exposure under state law by deferring to safety considerations at the expense of military effectiveness. See, e.g., *Bynum v. FMC Corp.*, *supra*, 770 F.2d at 566; *McKay v. Rockwell Int'l Corp.*, *supra*, 704 F.2d at 449-50.

The Solicitor General also properly stresses that contractor expertise and participation in design are essential to developing a technologically advanced and competitively equipped military. Brief for United States as *Amicus Curiae* at 12-13. The spectre of liability for participating in the design process, however, would cause contractors to be passive in simply carrying out governmental specifications (in the hope of invoking the defense set forth in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940)), rather than to cooperate actively in the design process. See *Tozer v. LTV Corp.*,

*supra*, 792 F.2d at 407; *Koutsoubos v. Boeing Vertol, Div. of Boeing Co.*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985).

As this Court long ago recognized in holding unconstitutional a state court's attempt to pass upon the enlistment of a military serviceman, "[n]o interference with the execution of [the] power of the National Government in the formation, organization and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service." *Tarble's Case*, 80 U.S. (13 Wall.) 397, 408 (1872). This perception is no less true today, see *Gilligan v. Morgan*, 413 U.S. 1 (1973), and requires recognition of a military contractor defense as a matter of federal law.

4. The functional bases for the federal military contractor defense have important and unmistakable constitutional dimensions. A principal purpose of the defense is, like the Act of State doctrine, to reflect a "basic choice regarding the competence and function of the Judiciary and the National Executive" and to assure the "proper distribution of functions between the judicial and political branches of the [federal] Government." *Sabbatino*, 376 U.S. at 425, 427-28. See *In re "Agent Orange" Product Liability Litigation*, *supra*, 818 F.2d at 191. Military design judgments are not proper grist for the judicial mill, federal or state. Thus, it would be especially improper to permit the military contractor defense, which is "rooted in separation of powers concerns" about the proper ordering of relationships among branches of the federal government, to be "frustrated by the application of state law and policies" or "'left to divergent and parochial state interpretations.'" *Bynum v. FMC Corp.*, *supra*, 770 F.2d at 570, quoting *Sabbatino*, 376 U.S. at 425.

Furthermore, the overriding federal interest in the relationship between military contractors and members of the military requires that a uniform federal rule govern this relationship. As Commander-in-Chief, the President

sends military personnel across the nation and around the world. There is no reason why the law applicable to the relationships among servicemen, the government, and military contractors should vary "in accordance with the different rulings of the several states, simply because the soldier marches or today perhaps as often flies across state lines." *Standard Oil*, 332 U.S. at 310; see *Stencel*, 431 U.S. at 672. Thus, for example, if the two crewmembers of a disabled Navy attack bomber eject and land on either side of the Georgia-Florida border, there would be no sense in applying a different state law to each pilot's claim that the bomber's design was flawed. See *Feres*, 340 U.S. at 143.<sup>4</sup>

In fact, many suits by servicemen against military contractors arise under federal law, such as the Death On The High Seas Act, 46 U.S.C. §§ 761 *et seq.*, or other

<sup>4</sup> As a matter of traditional choice-of-law analysis, a state usually has little or no interest in applying its law to an action between a transitory serviceman—in this case, a Marine carrier pilot—and a military contractor. The serviceman is unlikely to be a domiciliary of the state, and, because the military provides for his upkeep and medical care, the state has no welfare interest in assuring that he is compensated. Indeed, most states that have considered the military contractor defense have recognized the predominantly federal nature of the relationship and adopted the defense. See, e.g., *Tillet v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985) (Wisconsin law); *Dorse v. Armstrong World Industries, Inc.*, 513 So.2d 1265 (Fla. 1987) (on certified questions from 798 F.2d 1372 (11th Cir. 1986); opinion after response at 837 F.2d 957 (11th Cir. 1988); *Mackey v. Maremont Corp.*, 350 Pa. Super. 415, 504 A.2d 908 (1986); *McLaughlin v. Sikorsky Aircraft*, 148 Cal.App.3d 203, 195 Cal.Rptr. 764 (1983); *Hammond v. North American Asbestos Corp.*, 105 Ill.App.3d 1033, 435 N.E.2d 540 (1982), *aff'd*, 97 Ill.2d 195, 454 N.E.2d 210 (1983); *Hunt v. Blasius*, 55 Ill.App.3d 14, 370 N.E.2d 617 (1977), *aff'd*, 74 Ill.2d 203, 384 N.E.2d 368 (1978); *Casabianca v. Casabianca*, 104 Misc.2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980); *Sanner v. Ford Motor Company*, 144 N.J. Super. 1, 364 A.2d 43 (Law Div. 1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (App. Div. 1977), *certification denied*, 75 N.J. 616, 384 A.2d 846 (1978). State courts, however, do not always apply the defense. See, e.g., *Hansen v. Johns-Manville Corp.*, 734 F.2d 1036 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) (Texas law); *Norbriga v. Raybestos-Manhattan, Inc.*, 67 Haw. 157, 683 P.2d 389 (1984).

aspects of admiralty law. Federal law unquestionably controls the military contractor defense in such cases. No policy would be served by providing a federal defense to military contractors in federal cases, but allowing the states to control the outcome in other cases simply because the injury occurs within a state's borders. Thus, to take the attack bomber hypothetical discussed above, there is no legitimate rationale for applying federal law to the ejecting pilot's claim if he lands more than three miles offshore and thus becomes subject to the Death On The High Seas Act, and applying state law to the copilot's claim if he lands only two-and-a-half miles offshore and thus is subject to state law. If that were the case, the application of state law would, as in *Clearfield Trust*, produce "great diversity in results by making identical transactions subject to the vagaries of the laws of the several states." 318 U.S. at 367.<sup>5</sup>

5. Finally, as numerous courts have found and as the Solicitor General warns, potentially vast and open-ended military contractor liability would be reflected in cost overruns or increased liability-insurance pass-through in current military contracts, or in higher prices for future military equipment. See, e.g., Brief for the United States as *Amicus Curiae* at 16; *In re "Agent Orange" Product Liability Litigation*, *supra*, 818 F.2d at 191; *Bynum v. FMC Corp.*, *supra*, 770 F.2d at 566; *McKay v. Rockwell Int'l Corp.*, *supra*, 704 F.2d at 449; see also *Stencel*, 431 U.S. at 672-73; *Clearfield Trust Co.*, 318 U.S. at 366-67. This indirect assault on the federal treasury would circumvent the structure erected by Con-

<sup>5</sup> The overriding national interest in defense policy and military effectiveness distinguishes this case from, for example, cases like *United States v. Kimbell Foods, Inc.*, *supra*, *Miree v. DeKalb County*, 433 U.S. 25 (1977), and *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). Those cases involved federal programs tied to state law and operating on a local or regional level, or addressed issues involving only a tenuous federal interest. The Court thus decided to adopt state law as the federal rule of decision because the application of varying state law would not hamper federal interests. See *Kimbell Foods*, 440 U.S. at 730-32.

gress and this Court to govern compensation for servicemen injured in service-connected accidents. Congress has ordained that veterans' statutory benefits, *see, e.g.*, 10 U.S.C. §§ 1475 *et seq.*; 38 U.S.C. §§ 101 *et seq.*, be the "sole-remedy for service-connected injuries." *United States v. Johnson*, *supra*, 95 L.Ed.2d at 658; *Stencel*, 431 U.S. at 673; *Feres*, 340 U.S. at 142. The federal government and its officials are immune from direct liability for injuries sustained by active duty servicemen. *See Feres v. United States*, *supra*; *Stencel Aero Engineering Corp. v. United States*, *supra*; *United States v. Stanley*, *supra*. Subjecting military contractors to state-created tort liability for design decisions would, by virtue of the almost certain pass-through of such costs, "judicially admit at the back door that which has been legislatively [and judicially] turned away at the front door." *Stencel*, 431 U.S. at 673, *quoting Laird v. Nelms*, 406 U.S. 797, 802 (1972).

## II. THE COURT CAN RECOGNIZE AND DEFINE THE MILITARY CONTRACTOR DEFENSE WITHOUT DIRECT CONGRESSIONAL ACTION.

The question also has arisen whether the Court should defer to Congress in fashioning the military contractor defense. Judicial inaction in this case, however, would disserve the separation of powers because it would allow courts and juries to superimpose *their* views on military design judgments that are properly left to the political branches.

### A. Failure To Recognize The Military Contractor Defense Would Entangle The Courts In Executive Functions.

1. The courts wisely refrain from reexamining decisions made by the executive branch in pursuing our national defense or foreign affairs. As the Court explained:

"Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly

responsible to the people whose welfare they advance or imperil." *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948).

Indeed, these are the concerns that motivated the recognition of the Act of State doctrine as a defense to federal or state law claims that would require the courts to address sensitive foreign affairs issues. *Sabbatino*, 376 U.S. at 428. *See also Zschernig v. Miller*, 389 U.S. 429, 440 (1968).

For these reasons, as the Court recently observed, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of the Navy v. Egan*, — U.S. —, 98 L.Ed.2d 918 (No. 86-1552) (1988). Emphasizing that "judges are not given the task of running the Army," the Court has admonished:

"Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Orloff v. Willoughby*, *supra*, 345 U.S. at 93.

Similarly, the Court has foreclosed judicial review of the conduct of superior officers because it would undermine military effectiveness. *Chappell v. Wallace*, *supra*.

The need to avoid judicial intrusion into military affairs is the principal basis for the decision in *Feres* nearly forty years ago, and for the application of that doctrine in *Stencel*, *Stanley*, *Johnson* and *Shearer*. *See United States v. Shearer*, *supra*, 473 U.S. at 57-58. The Court has consistently cautioned against entertaining "the *type* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." *Id.* at 59 (original emphasis). "The danger is in allowing a civilian court to second-guess military decisions . . . ." *Id.* at 57 (citations omitted). The *Feres* doctrine, there-

fore, is "not a matter of personal immunity," but "has far more to do with the proper relation between the courts, Congress and the military than it has to do with individual defendants." *Stauber v. Cline*, 837 F.2d 395, 399 (9th Cir. 1988). It is "a judicial doctrine leaving matters incident to service to the military, in the absence of congressional direction to the contrary." *Id.*

2. These separation-of-powers concerns explain why, even in the absence of specific congressional action, courts and juries must defer to the special competence of the executive in the design of military equipment:

"Trained professionals, subject to the day-to-day control of responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, *equipping*, and controlling military forces with respect to their duties under the Constitution.

\* \* \*

"Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, *equipping*, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan v. Morgan*, *supra*, 413 U.S. at 8, 10 (emphasis added).

The military contractor defense is a corollary of these principles. As the Florida Supreme Court recently held, "the federal war-making and defense power, which the Constitution has entrusted exclusively to the president and Congress" means that, as a matter of federal law, "traditional separation of powers doctrine compels the defense." *Dorse v. Armstrong World Industries, Inc.*, *supra*, 513 So.2d at 1268, quoting *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 740 (11th Cir. 1985), petition for cert. pending, No. 85-1529 (filed March 17, 1986). Indeed, every federal court considering the question has concluded that "[s]ubjecting military contractors to full tort liability would inject the judicial branch

into political and military decisions that are beyond its constitutional authority and institutional competence." *In re "Agent Orange" Product Liability Litigation*, *supra*, 818 F.2d at 191. See, e.g., *Tozer v. LTV Corp.*, *supra*, 792 F.2d at 406 ("[c]ivilian scrutiny of [military design] decisions is generally exerted through executive and legislative oversight on behalf of the public at large, not, as here, through the judiciary at the behest of an individual serviceman").

Moreover, courts traditionally hesitate to act on issues where their determinations are prone to error. See, e.g., *United States v. Stanley*, *supra*, 97 L.Ed.2d at 566. See also *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, *supra*, 333 U.S. at 111-13; *In re Paris Air Crash*, 622 F.2d 1315, 1319 n.5 (9th Cir.), cert. denied, 449 U.S. 976 (1980). The federal executive, with literally thousands of professional specialists devoting their careers to these delicate issues, possesses special expertise in military affairs, including the design of suitable military equipment and weapons. The courts, by comparison, lack the expertise or resources to consider these questions, but in the absence of the military contractor defense they would be required to do so.

#### **B. Abstention In The Absence Of Direct Congressional Action Is Not Appropriate.**

In *Standard Oil*, the Court considered whether the government should be able to bring tort suits against private persons who injure soldiers. The Court held that the issue must be governed by federal law, but decided to defer to Congress on the question. Thus, the Court took the question out of the states' hands, and left the liability question to Congress. See also *United States v. Gilman*, 347 U.S. 507 (1954).

1. The abstention exhibited in *Standard Oil* is not appropriate in this case. In *Standard Oil*, the only question was "which organ of the [federal] Government" was "to make the determination that liability exist[ed]." 332

U.S. at 316. Because the Court had federalized the question, there was no danger of state judicial intervention in uniquely federal policy issues; no liability would be created in the absence of congressional action. *Id.* at 314-15.

By contrast, if this Court were to hold here that the existence of a military contractor *defense* is a matter of federal law but that it is up to Congress to fashion it, military contractors nevertheless would stand exposed to tort liability under state law unless and until Congress acted. This would require both federal and state courts to become entangled in military decision-making when they try to resolve servicemen's tort suits against military contractors, except to the extent that individual states choose to adopt a military contractor defense. Thus, abstention would leave the separation-of-powers problem to fester without relief.

Furthermore, in *Standard Oil*, the Court was asked to create a new cause of action and thus to enlarge federal judicial jurisdiction. Federal courts are properly reluctant to do so in the absence of congressional guidance. In formulating a federal *defense* applicable to military design decisions, however, the federal courts are simply exercising two justiciable obligations: first, under the Supremacy Clause, to assure that state law does not improperly encroach on the federal domain, and second, under separation-of-powers principles, to assure that the courts do not improperly interfere in matters committed to the elected branches.<sup>6</sup>

<sup>6</sup> Congress has been aware that the lower federal courts unanimously have recognized the military contractor defense. Contrary to petitioner's claims, however, Congress has shown no inclination to disavow the defense. See Reply Brief for Petitioner at 4-6. Petitioner relies on Section 794 of the Department of Defense Appropriations Act, 1984, Pub.L. No. 98-212, 97 Stat. 1454 (1983). That statute has been repealed. Section 1234(b)(1) of the Defense Procurement Reform Act of 1984, Pub.L. No. 98-525, 98 Stat. 2601 (1984) (codified at 10 U.S.C. § 2403). Moreover, Section 794 simply

2. Another of the Court's concerns in *Standard Oil* was that creating the proposed new cause of action would have involved "a possible element of surprise, in view of the settled contrary practice." 332 U.S. at 316. See also *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, *supra*, 451 U.S. at 634-35. By contrast, the military contractor defense is actually an outgrowth of common law principles. Although it implements constitutional principles of national supremacy and separation of powers, the defense is in effect an "amalgamation" of "two traditional defenses." *Bynum v. FMC Corp.*, *supra*, 770 F.2d at 565. First, it reflects the long-standing rule of *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), that a government contractor shares in the government's immunity when acting as its agent and carrying out government specifications. See, e.g., *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963). Second, the defense finds roots in the old common law "contract specification defense," recognized by this Court in *United States v. Spearin*, 248 U.S. 132 (1918), that contractors generally will "not be liable for damages resulting from

required that military contractors guarantee that weapons systems are designed and manufactured to conform to contractual performance requirements, and did not address alleged "design defects" outside the scope of the specification requirements. Section 794, therefore, is irrelevant to military contractors' liability under state tort law to servicemen for service-connected injuries resulting from a government-approved design. If anything, Section 794, as well as the Defense Procurement Reform Act, show that Congress intends that military contractors' warranty liability be predicated on its federal contract, not state tort law.

Petitioner also points to H.R. 4083 and H.R. 4199, both of the 98th Cong., 2d Sess. (1984), and S. 1254, 99th Cong., 1st Sess. (1985), which would have amended the Federal Tort Claims Act to establish a new right of indemnification for government contractors and subcontractors. These bills did not address the military contractor defense and suffered from many other problems as well. See, e.g., *Brief of United States as Amicus Curiae* at 21-22 n.21. In any event, the bills failed in committee and thus are of no consequence here.

specifications provided by another," *Bynum v. FMC*, *supra*, 770 F.2d at 563.<sup>7</sup>

Moreover, far from being a surprising change in the law, the military contractor defense is a logical corollary of the principle applied in *Feres*, *Stanley* and other cases prohibiting soldiers from suing the government, military superiors, or civilian government employees for service-connected torts. The defense also draws upon the general common law principle that public servants who face hazards as part of their jobs are barred from suing for damages sustained in performing their duties. *See* Brief for Respondent at 29-30. The military contractor defense, therefore, is no more than another example of the legitimate and traditional role the courts play in shaping the outer limits of common law liability.

This Court, therefore should affirm the view—adopted by each of the circuits that has considered the question, as well as by many state courts—that separation of powers principles and other important federal policies require courts to refrain from examining the design decisions of military contractors, at least where the government is a substantial participant in the design process.

#### CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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<sup>7</sup> *See, e.g.*, Restatement (Second) of Torts, § 404 comment a (1965); *Ryan v. Feeney & Sheeham Building Co.*, 239 N.Y. 43, 145 N.E. 321 (1924). *See also In re "Agent Orange" Product Liability Litigation*, *supra*, 818 F.2d at 190-91.

# **SUPPLEMENTAL BRIEF**

No. 86-492

Supreme Court, U.S.

FILED

APR 13 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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DELBERT BOYLE, personal representative of the  
Heirs and Estate of David A. Boyle, deceased  
*Petitioner,*

v.

UNITED TECHNOLOGIES CORP.,  
*Respondent.*

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**SUPPLEMENTAL BRIEF - AMICUS CURIAE  
ON BEHALF OF JOAN S. TOZER, KATHERINE S.  
TOZER AND LINDSAY M. TOZER**

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IN THE  
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v.

UNITED TECHNOLOGIES CORP.,  
*Respondent.*

---

**SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
JOAN S. TOZER, ET AL.**

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An *amicus curiae* brief on behalf of Joan Tozer, *et al.*, was accepted by the Court. This supplemental brief has been permitted pursuant to an order of this Court dated March 7, 1988.

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## STATEMENT

FEDERAL COMMON LAW SHOULD NOT BE  
FASHIONED TO PROTECT PRIVATE MANUFACTURERS  
FROM CONSEQUENCES OF THEIR NEGLIGENT DESIGN  
AND SALE OF MILITARY EQUIPMENT.

There is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

The instant case follows the case of *Tozer v. LTV, Corp.*, 792 F.2d 403 (4th Cir. 1986), *petition for cert. pending*, (Pet. 86-674), wherein the Fourth Circuit literally fashioned federal common law based upon the rationale in *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), and under a separation of powers theory. It appears that while the Fourth Circuit was conscious of a separation of powers, it violated those bounds by making unsupported socio-economic assumptions without the benefit of the detailed legislative process in order to fashion law to immunize private parties in their profit making ventures. Thus, these assumptions are made without evidentiary support, statistical data or careful analyses of conflicting theories.

The *McKay* court was fearful of the possibility that accountability for torts would have some type of a chilling effect on the duties of manufacturers. The *Tozer* court reemphasized this fear by stating that: "[p]ermitt[ing] recovery for design defects under any theory of liability risks altering the nature of the procurement process." The *Tozer* court continued that unless this defense was established, there would be a decrease in contractor participation in design and that an increase in the cost of military weaponry and

equipment would take place which would diminish efforts in contractor research and development. *Tozer*, 792 F.2d at 407.

As Judge Alarcon commented in his dissent in *McKay*, such conclusions are incorrect. *McKay*, 704 F.2d at 457, 458. Further, there was no evidence introduced in *Tozer*, and, to the knowledge of this *amicus*, no evidence introduced in any of the present government contractor cases supporting these assumptions. Significantly, when Congress studied the subject in 1984 and 1985, both the Departments of Justice and Defense offered testimony that the present system of accountability for tortious design was indeed necessary to encourage manufacturers to work more closely and conscientiously in their profit making endeavors. *Government Contractor's Product Liability and Indemnification Acts, 1977: Hearings on H.R. 4083 and H.R. 4199 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 50, 59-64 (1984); and, Hearings on S.1254 Before the Comm. on the Judiciary, 99th Cong., 1st Sess. 23, 30 (1985).* (Relevant portions contained in *Tozer amicus* brief)

The assumption that the present tort system would create an undesirable cost pass through to the taxpayers also has no evidentiary basis in any of the subject cases. The liability in *Tozer* was privately insured by the defendant. There was no evidence that the presence of insurance inflated the prices charged to the government or, more importantly, that the elimination of tort liability for design will affect overall unit costs in the future. There has been no judicial survey or study made on this issue in any of these

cases without which it would be presumptuous to conclude that insurance premiums would be lowered if immunity were to be fashioned for this segment of private industry. If Congress chose to fashion a government contractor defense, there would at least be an opportunity to explore that vital ingredient, among others, in an effort to prevent a windfall to the insurance industry.

Likewise, the fear that manufacturers' accountability for tortious design may possibly interfere with military decisions has absolutely no evidentiary basis in any of the cases before this Court. The *Tozer* case, for example, involves a manufacturer's decision or omission to place enough fasteners on an aircraft access panel which it designed, proposed, specified and sold to the Navy. There was no evidence or indication that holding the private manufacturer liable ever threatened to affect a military decision, command, tactic, strategy or policy in any manner. There has been no evidence known to this *amicus* that holding a manufacturer liable for tortious design has been hampering our military or has had any other adverse effect on either our defense system or the manufacturers' incentive to sell new equipment to our government or any other government.

The existence of approval of specifications which must precede the sale of these products in the procurement process should not be elevated to the status of a military decision without factual inquiry. As Judge Alarcon pointed out in his dissent in *McKay*, even the Ninth Circuit recognized that inspection and approval do not constitute direction or compulsion and that manufacturers can be responsible for their own actions and design decisions despite government ap-

proval. *McKay*, 704 F.2d at 450. The validity of his observation is confirmed by the testimony of the Justice Department before Congress in 1984 and 1985. Hearings, *supra*. The approach taken in *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), *petition for cert. pending*, (Pet. No. 85-1529), an admiralty case, at least allows for inquiry into that fact sensitive issue, and it is respectfully submitted that, if the Court were to fashion federal common law, that it be done along the lines of *Shaw* instead of summarily legislating immunity for private industry.

#### CONCLUSION

The decisions of the Fourth Circuit in *Tozer* and *Boyle* overruling the jury findings of negligence should be reversed.

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**SUPPLEMENTAL**

**BRIEF**

No. 86-492

FILED

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In The  
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DELBERT BOYLE, personal representative of the  
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*Petitioner,*

v.

UNITED TECHNOLOGIES CORPORATION,

*Respondent.*

**SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
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QUESTION PRESENTED

When the "government contractor defense" should be available to a supplier of military equipment.

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| <u>Borel v. Fibreboard Paper<br/>Products Corp.</u> , 493 F.2d 1076<br>(5th Cir. 1973), cert. denied,<br>419 U.S. 869, 95 S.Ct. 127,<br>42 L.Ed. 107 (1974). . . . . | 8,9         |
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| <u>Note, Liability of a Manufacturer</u><br><u>for Products Defectively Designed</u><br><u>by the Government, 23 B.C.L.Rev.</u><br><u>1025 (1982)</u>                                   | 7   |
| <u>Note, You're In The Army Now:</u><br><u>Tozer v. LTV Corp. and the</u><br><u>Government Contractor Defense,</u><br><u>22 Tort &amp; Ins. L.J. 467</u><br><u>(Spring 1987).</u>       | 3,4 |

No. 86-492

IN THE SUPREME COURT OF THE UNITED STATES  
October Term 1986

DELBERT BOYLE, personal representative of  
the Heirs and Estate of David A. Boyle,  
deceased,

Petitioner,

v.

UNITED TECHNOLOGIES CORPORATION,

Respondent.

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SUPPLEMENTAL BRIEF OF AMICUS CURIAE  
ASSOCIATION OF TRIAL LAWYERS OF AMERICA  
IN SUPPORT OF PETITIONER

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SUMMARY OF ARGUMENT

Manufacturer responsibility for unsafe products will not adversely affect military decisions and the judiciary has the authority to protect the rights of persons who may be injured by products manufactured for the military. Civilian juries are able to make decisions about military products because, aided by expert witnesses, juries

have decided actions involving complex issues and advanced technologies.

The defense should not reward a manufacturer who knows as little as possible about its products with immunity. This is why the appropriate test is that the contractor did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or that it timely warned the military of the risks of the design of the defective products; and notified it of alternative designs reasonably known by the contractor; and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design. "Reasonable knowledge" means that the manufacturer is presumed to know of the defects in the things it makes.

## ARGUMENT

### I. MANUFACTURER RESPONSIBILITY FOR UNSAFE PRODUCTS WILL NOT ADVERSELY AFFECT MILITARY DECISIONS.

While the executive and legislative branches of the federal government are imbued in the Constitution with the primary authority to control military affairs, it does not preclude the judiciary from intervening to protect important rights of military personnel that may be threatened. Note, You're In The Army Now: Tozer v. LTV Corp. and the Government Contractor Defense, 22 Tort & Ins. L.J. 467, 480 (Spring 1987). The judiciary has been increasingly active in protecting the constitutional rights of servicemen and civilians against abuse by the military. Flower v. United States, 407 U.S. 197, 199 (1971); Hogopian v. Knowlton, 470 F.2d 201 (2d Cir. 1982). There is no reason why the judiciary should not exercise its traditional authority in the realm of products liability law to

protect servicemen from the negligence of government contractors. Id.

Any claim that civilian juries are unable to make informed judgments about military products must fail because juries, aided by expert witnesses, can and have decided actions involving complex issues and advanced technologies. Standard Oil Co. of California v. Arizona, 738 F.2d 1021, 1031-32 (9th Cir. 1984). Just because an action involves military products does not justify nullifying the traditional province of the jury.

An injured party with an otherwise meritorious claim should not be denied compensation simply because he had the misfortune to be injured by a product manufactured for the military. Westfall v. Erwin, \_\_\_\_ U.S. \_\_\_\_, 108 S.Ct. 580, 583 (1988). This Court should consider whether any claimed contribution to effective government in this context outweighs the

potential harm to individual citizens. Id. The claimed purposes of the government contractor defense do not justify extending governmental immunity to private contractors. The tort system creates the safety incentive. Indemnification of Government Contractors: Hearing on S. 1254 Before The Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 26 (1985) (Statement of Richard K. Willard, United States Department of Justice). This defense removes it. Thus, in order to encourage suppliers to produce safe equipment, liability should be the rule rather than immunity.

II. IF THIS COURT CONCLUDES A DEFENSE IS NECESSARY, THE COURT SHOULD TAKE CARE TO DISTINGUISH BETWEEN THE "GOVERNMENT CONTRACT DEFENSE" AND THE "CONTRACT SPECIFICATIONS DEFENSE" AND SHOULD MAKE THE DEFENSE AVAILABLE ONLY IF THE CONTRACTOR HAS TAKEN APPROPRIATE ACTION TO PROTECT THE PRODUCT USER.

The contract specifications defense provides that a contractor is not liable for damages resulting from specifications

provided by another unless those specifications were so obviously defective and dangerous that a contractor of reasonable prudence would be put on notice that the work was dangerous and likely to cause injury. Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985). The contract specifications defense is distinguished from the government contractor defense because it has its source in ordinary negligence principles and applies to products manufactured to the order and specification of another, whether it be the government or a private party. On the other hand, the government contractor defense is not based on ordinary negligence principles and applies only when the product has been manufactured pursuant to a contract with the government. Johnston v. United States, 568 F.Supp. 351 (D. Kan. 1983). The contract specifications defense points out the flaws in the government contractor defense. Where

the contract specifications defense is not available when the specifications are so obviously defective and dangerous that a reasonable contractor would have declined to follow them, the government contractor defense may insulate contractors even when the specifications provided by the government are obviously dangerous. Note, Liability of a Manufacturer for Products Defectively Designed by the Government, 23 B.C.L.Rev. 1025 (1982).

The contract specifications defense comes from cases where the contractors were complying with precise specifications established by the government and where the contractors had no discretion or control over the design of the projects. Littlehale v. E.I. duPont de Nemours, 268 F.Supp. 791, 802 (S.D.N.Y. 1966). However, military contractors, unlike contractors in the early cases, cannot claim that they are merely executing the design choices of

another. A contractor merely following the specifications of another should still be held strictly liable for product design defects if the acts of the contractor meet the test suggested by *Amicus Curiae ATLA*.

*Amicus Curiae ATLA* submits that the proper test is that set forth in *Shaw v. Grumman Aerospace Corporation*, 778 F.2d 736 (11th Cir. 1985), cert. pending, with the knowledge test being that set forth in *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973), cert. denied, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed. 107 (1974). *Shaw's* test holds that a contractor may escape liability only if it affirmatively proves: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor,

and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design. *Id.*, at 746. The *Borel* test regarding knowledge is that the manufacturer is held to the knowledge and skill of an expert. *Id.* This Court should not reward a lack of knowledge, lack of research, and lack of testing that would disclose the danger of a product with immunity. Nor should failure to implement available, but generally disregarded, devices be rewarded with immunity.

### CONCLUSION

For the reasons set forth above, Amicus Curiae ATLA respectfully requests that this Court hold that the "government contractor defense" be available only if the contractor has taken the steps to protect the user of the product which comply with the suggested test set out at page 6 of the Brief of Amicus Curiae ATLA.

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### CERTIFICATE OF SERVICE

Dale Haralson, an attorney for Amicus Curiae and a member of the Bar of this Court, certifies that on April 13th, 1988, copies of the foregoing Supplemental Brief were served by mail upon all parties required to be served:

The Solicitor General of the United States  
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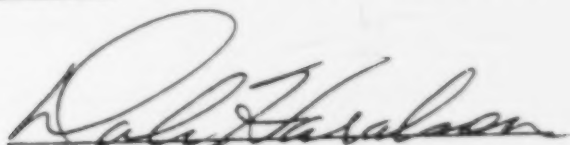
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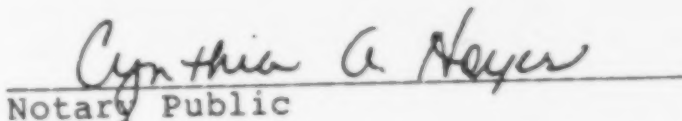
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SUBSCRIBED AND SWORN to before me this

13th day of April, 1988.

  
Notary Public

My Commission Expires:

My Commission Expires September 19, 1991  
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